



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

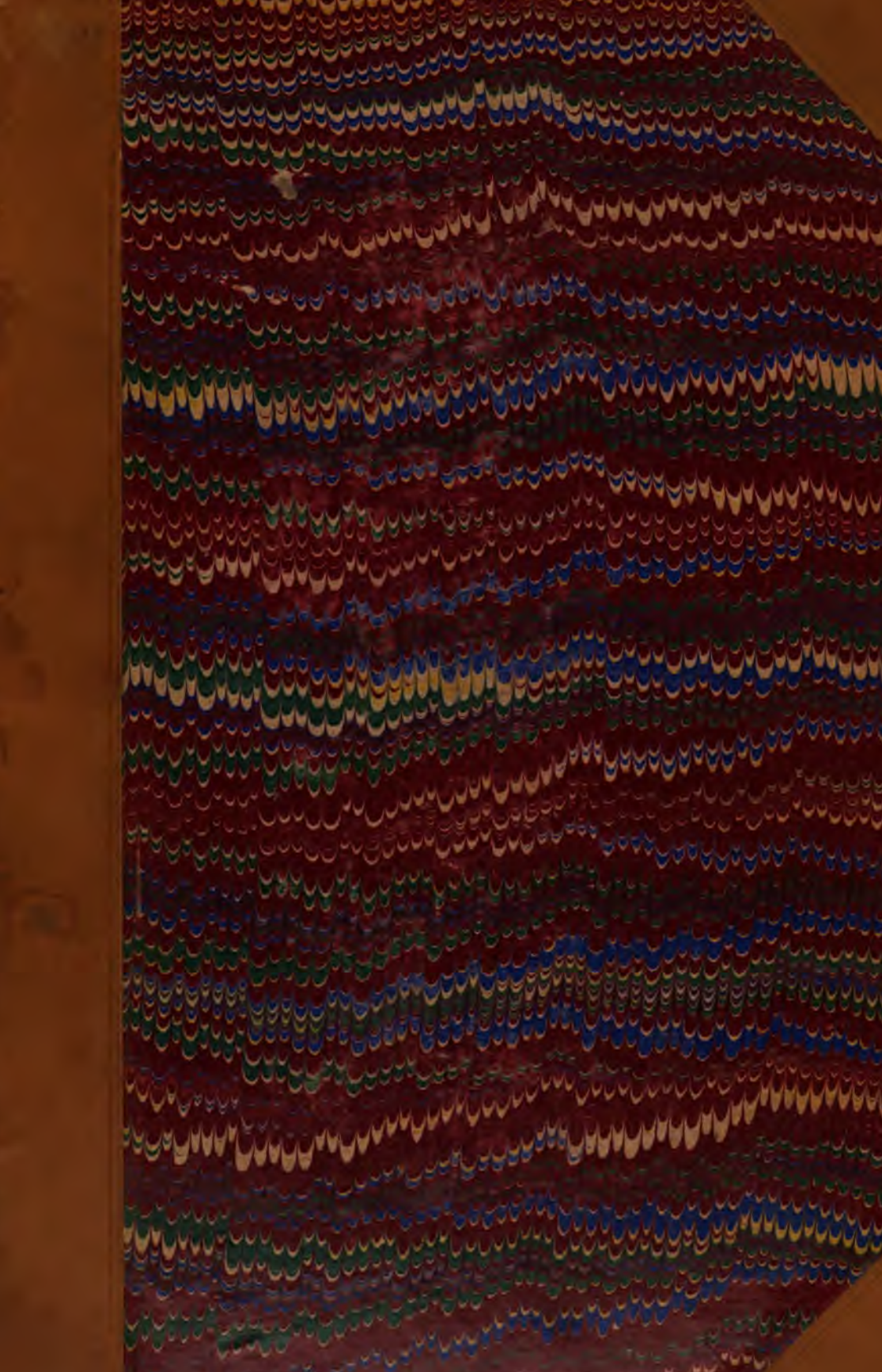
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

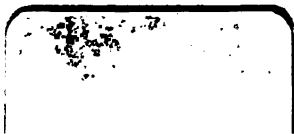
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





GARSWELL & CO.
TORONTO, ONT.
NEW YORK
PHILADELPHIA
DEALERS AND
*** BANKERS ***



THE
2801
LEGAL NEWS,

EDITED

BY

JAMES KIRBY, D.C.L., LL.D.,

Advocate.

VOL. IV.

Montreal:
RICHARD WHITE,
THE GAZETTE PRINTING COMPANY.

1881.

59,501

LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.

TABLE OF CASES

REPORTED, NOTED AND DIGESTED,

IN VOL. IV.

Abrahams & The Queen.....	90	Baxter v. Sills.....	221
Ackert v. Barker.....	368	Beatty, In re.....	48
Allan v. Mullin.....	387	Beaudry et al. v. Bond.....	227
Alleman v. Stepp.....	314	Beausoleil v. Méthot.....	384
Allen v. City of Chippewa Falls.....	376	Becket v. Tobin.....	219
Almon et al. & Lewis et al.....	124	Belanger v. Contant, & Smart.....	373
American Union Telegraph Co. v. Bell Telephone Co.....	63	Belcourt v. Macdonald.....	226
Anctil v. Déchène.....	111	Belisle, Ex parte.....	391
Arcand v. Flanagan.....	376	Benatchez v. Hamond.....	191
Argall v. Old North Star Ins. Co.....	280	Bennett & The Pharmaceutical Association of the Province of Quebec.....	125
Armstrong v. The Northern Insurance Co.	77	Bernard v. Gaudry et al.....	53, 385
Atalaya, The.....	169	Bertrand v. Julien et al.....	384
		Bertrand v. Pepin dit Lachance.....	120
Balle et al. v. St. Joseph Fire & Marine Ins. Co.....	330	Berubé v. Ouellet.....	343
Ballard v. Schutt.....	8	Bilodeau v. Giroux.....	247
Bank of America v. Copland et al.....	154	Binks v. Rector & Churchwardens of the Parish of Trinity.....	415
Bank of Montreal v. Rankin.....	302	Birabin dit St. Denis v. Lombard.....	355
Banque d' Hochelaga v. Goldring.....	324	Black et al. & Stoddart.....	282
Banque d' Hochelaga v. Montreal, Portland & Boston Railway Co.....	332	Blaikie v. Linton.....	265
Banque du Peuple v. Viau.....	133	Bloomington v. Perdue.....	256
Banque Jacques Cartier & Beausoleil es qual.....	116	Blouin v. Corporation of the City of Quebec.....	153, 158
Banque Jacques Cartier v. Meunier, & Prevost et al., collocated.....	213	Boecker v. Foreman et al., & Bank of Toronto.....	263
Banque Nationale v. Lesperance et al.....	147	Boileau v. Corporation de la Paroisse de Ste. Geneviève.....	404
Banque Ville Marie & Primeau.....	19	Bowes v. Ramsay.....	227
Banque Ville Marie v. La Société de Con- struction du Canada, & Jolicoeur et al. T.S.....	86	Boyd v. Wilson et al.....	365
Baril v. Masterman.....	181	Bozzo v. Moffatt et al. & E. Contra.....	61
Bartlett v. Eyre.....	216	Brake, In the Goods of.....	407
Bast v. Byrne.....	408	Brasswell v. The State.....	136, 329
		Breakey v. Carter et al.....	384
		Bridgewater, The.....	110
		Brousseau, Ex parte.....	99

Brown et al. v. Guy et al.....	264	Corbeil v. Charbonneau, & Martineau, T.S.	60
Brown v. Watson et al.....	404	Corbeil v. Charbonneau.....	273, 277
Brunet et al. v. Lacoste et al.....	245	Corporation (La) du Village de Bienville v.	
Burke v. Colfer.....	120	Gillespie et vir.....	134
Burland-Desbarats Lithographic Co.		Corporation of the Village of Ste. Rose v.	
v. Bemister.....	101	Dubois.....	334
Bussière v. Gaboury.....	240	Corporation of the Village of Verdun &	
		Les Sœurs de la Congregation Notre	
Caffrey & Lighthall.....	282	Dame de Montréal.....	115
Campbell v. James et al.....	210	Corporation of the Village of L'Assomption	
Campbell v. McGrail et al. & McGrail,		& Baker.....	370
petr.....	325	Corporation of Quebec v. Leaycraft.....	240
Campbell v. Victoria Mutual Ins. Co.....	80	Corse et vir v. Drummond.....	283
Canadian Copper & Sulphur Co. v. Marion		Cosgrave v. Boyle.....	194
et al.....	356	Cossitt et al. v. Lemieux.....	263
Capital & Counties Bank v. Henty.....	56	Coté et al. v. Morgan et al.....	230
Castro v. <i>Regina</i>	103, 231	Coté v. Chauveau et al.....	384
Carrier v. Boucher.....	64	Court es qual. v. Waddell.....	78
Carrier v. Coté.....	110	Couture v. Fournier.....	191
Carrier v. Ward.....	106	Crevier v. La Société d'Agriculture de Ber-	
Carter v. Ford et al.....	77	thier.....	373
Charest v. Veilleux.....	157	Cross v. Cross.....	344
Chaussé v. Lareau.....	351	Croteau v. Demers.....	400
Chenier v. Corporation of St. Clet.....	335	Crowley v. Chretien.....	171
Cherel, Ex parte.....	303		
Cherrier v. Torcapel.....	157	Dahl & Co. v. Nelson & Co.....	248
Chester et al. v. Galt es qual.....	398	Daly & Chevrier.....	82
Chevallier v. Cu villier et al.....	306	Dansecreau et al. & The Corporation of the	
Chevrier v. Vachon et vir.....	108	Parish of St. Antoine.....	299
Chrétien v. Poitras.....	247	Darling es qual. v. McIntyre et al.....	118
Cimon v. Perrault.....	94	Darling et al. & Barsalou et al.....	37
City of Montreal v. Latour et al.....	243	David, In re, Beausoleil, assignee, & Trust	
City of Montreal & Loignon.....	386	& Loan Co., Petr.....	107
City of Montreal v. Tracy.....	156	Davis v. Somerville.....	313
Clark v. Crane.....	224	Dawkins v. Antrobus.....	288
Clarke v. Midland Railway Co.....	128	De Bellefeuille et al. v. La Municipalité du	
Club Canadien v. Beaudry et al., & Symes		Village de St. Louis du Mile End....	42
et vir, opposants.....	131	De Bellefeuille v. Pollock.....	134
Coady v. Fraser.....	158	Debenham v. Mellor.....	8
Colonial Building & Investment Association		Deland et al. v. Desrivieres.....	40
v. Fletcher.....	374	Delisle & Les Commissaires d'Ecole de St.	
Commissaires (Les) d'Ecole de Sillery v.		Jean.....	120
Gingras et al.....	157	Delisle v. Sanche, & Levy, opposant.....	101
Commonwealth v. Harris.....	344	De May v. Roberts.....	231
Commonwealth of Massachusetts v. Moore	200	Demers v. Lamarche et al.....	54
Commonwealth v. Willard.....	136	De Montigny v. The Watertown Agricultu-	
Compagnie (La) de Navigation Union v.		ral Ins. Co.....	132
Christin, & Lefebvre et al., intervening	162	Derome & Robitaille et al.....	99
Compagnie (La) du Chemin de Péage de		Deschenes v. La Corporation de Ste. Marie	240
la Pointe Claire v. Valois.....	334	Desjardins et vir v. Gravel et ux.....	39
Content v. Poirier.....	324	De Varennes v. Hallé et al.....	375

TABLE OF CASES.

v

Devine et al. v. Griffin.....	61	Fleming v. Mayor and Corporation of Man- chester.....	260
Devlin v. Beemer.....	59	Fletcher & The Mutual Fire Ins. Co. for Stanstead & Sherbrooke Counties.....	115
Dewe v. Waterbury.....	93	Forget dit Deputy v. Senecal.....	85
Dicks v. Brooks.....	8	Fox v. Bearblock.....	240
Dicks v. Yates.....	265	Fraser v. Pouliot et al.....	280
Dillon, Case of.....	413	Fuller v. Farquhar et al.....	244
Dillon v. City of Montreal.....	300	Fuller et al. & Fletcher.....	96
Dinan v. Breakey.....	248		
Dion v. Toussaint.....	192		
Diotte v. City of Montreal.....	243		
Doble v. Board for the Management of the Temporalities Fund, &c.....	258	Gadbois v. Laforce et al.....	244
Dominion Telegraph Co. v. Gilchrist.....	91	Gagnon, Ex parte.....	108
Donaldson & Charles.....	35	Gagnon v. Lalonde.....	85, 277
Dorion et al. & Loranger.....	372	Gallagher v. Taylor.....	94
Doutre v. Regina.....	18, 34	Gault et al. & Dussault.....	321
Drouin v. Hallé, & Langlois.....	280	Gauron v. Commissaries d'Ecole de St. Louis de Lotbinière.....	375
Dubuc v. Kidston et al.....	239	Gauthier, Ex parte.....	132
Dufresne, Ex parte.....	253	Gauvreau v. Roy.....	415
Dupras es qual. v. Sauvé.....	164	General Birch, The.....	111
Dupras es qual. v. Sauvé et al.....	299	Geoffrion v. Corporation of Boucherville..	358
Dupuy vs. McClanaghan.....	276	Gerbeau v. Blais.....	191
Duquette v. Patenaude et al.....	187	Ginesi v. Cooper.....	222
Durocher v. Jodoin.....	323	Gingras v. Gingras et al.....	352
Dustin v. The Hochelaga Mutual Fire Ins. Co.....	295	Gingras v. Desilets et al.....	91
Dynes v. Falardeau.....	120	Goffen v. Donnelly.....	192
		Gohier, In re, & Perkins.....	299
Eckenrode v. Chemical Company of Canton	208	Gonsales v. Broad.....	208
Elphick v. Barnes.....	288	Goodwater v. Henderson.....	206
Empress v. Gonesh Dooley.....	241	Gordon v. McDonald.....	133
Erb et al. v. Great Western Railway Co.	247	Gorrie et al. v. Ogilvie et al.....	229
Evans v. Fraser.....	51	Gosman, In re.....	407
Evans v. Ives.....	369	Gosselin v. Naulin.....	400
Evans v. Lionais es qual. & Doucet, T.S..	110	Goulet v. Stafford.....	357
Evans et al. & McLea et al.....	76	Grand Trunk Railway Co. v. Currie.....	45
Exchange Bank of Canada v. Murray, & Brown et al., opposants.....	140	Grand Trunk Railway Co. v. Fitzgerald et al.....	247
		Grand Trunk Railway Co. v. Hall et al...	45
Fair es qual. v. Cassils et al.....	102, 170	Grant & Beaudry.....	393
Fair et al. & Desilets.....	84	Greene et al. v. Wilkins, & Lewis et al., intervening.....	186
Fairview v. Wheeler.....	237	Gregory v. Canada Improvement Co.....	390
Felton v. Asbestos Packing Co.....	384	Gretta v. State.....	160
Felton v. Gregory.....	113	Gross v. Rice.....	289
Ferguson v. Smethers.....	16	Guay v. Caron.....	352
Ferris v. Thaw.....	344		
Finn v. Dominion Savings & Investment Co.....	48	Hadley v. O'Brien, & O'Brien, opposant..	101
Fisher v. Graham.....	80	Hall v. Carmichael.....	314
		Hall v. Harrison, & Stuart, T. S.....	325

Hall v. Hould.....	192	Leonard v. Jobin.....	55
Hamaker v. Blanchard.....	33	Leroux v. Deslauriers, Norman, opposant, & Dumouchel, <i>mis en cause</i>	173
Hanks v. Naglee.....	314	Leroux v. Deslauriers, Normand, opposant, & Dumouchel, petr.....	256
Hoffman v. Pfeiffer.....	248	Leroux v. Victor Hudon Cotton Co....	46, 118
Hopper, In re, & Elliott.....	298	Levi v. Reed.....	91
Hossack v. Paradis.....	375	Levis v. Connolly.....	352
Howard et al. v. Yule.....	126	Lewis, In re.....	134
Hurtubise v. Riendeau, & Tessier.....	354	Lewis v. Senecal.....	221
Jenkins v. Morris.....	8	L'Heureux v. Boivin.....	352
Jenner v. Turner.....	56	L'Heureux v. Martineau.....	64
Johns v. Marsh.....	224	Life Association of Scotland v. Downie...	47
Johnson v. Baylton.....	392	Longford, The.....	142
Jonas v. Gilbert.....	93	Longpré et al. & Valade.....	34
Jordan v. Hovey.....	344	Loranger v. Dorion et al.....	108
Joseph et al. v. Fortin et al.....	247	Lord et al. v. Bernier et al.....	182
Joseph & Murphy.....	101	Low v. Montreal Telegraph Co.....	293, 381
Kane & Wright et al.....	15	Ludgater v. Love.....	336
Kerby v. Thayer.....	347	Lunsford v. State.....	168
Kerr & Peltier.....	100	McAllen v. Ashby, & Ashby, petr.....	50
Knecht v. Mutual Life Ins. Co.....	314	McCrae v. Miller.....	324
Lafrance v. Jackson.....	60	McDougall v. Scott.....	323
Lafricain v. Villeneuve, & Dugas et al., T.S.	54	McGreevy v. Paille.....	95
Lajoie v. Desaulniers.....	400	McKay v. Fletcher, & St. Julien et al., T.S.	374
Lake St Francis Navigation Co. v. Bush....	342	McKensie v. British Linen Co.....	240
Lalonde dit Latreille v. Prevost.....	173	McLaren et al. v. Kirkwood, and Brooke, petr.....	45
Lambe v. Hartlaub et al.....	138	McLellan, In re, & Hale.....	351
Lamoureux, Ex parte, and Luttrell et al...	298	McLennan v. Grange.....	170
Lane v. Taylor et al.....	386	McLeod & Masham.....	99
Lareau et al. & La Société Permanente de Construction Jacques Cartier.....	363	McMillan v. Malloy.....	314
Larue v. Deslauriers.....	95	McNamee et al. v. Jones et al.....	102
Latour v. Brunelle, & Lareau, T. S.....	141	McNichols es qual. v. Canada Guarantee Co.	78
Latter v. Braddell.....	112, 128	McRobie v. Shuter et al.....	134
Laurent v. Theriault.....	373	Macungie Savings Bank v. Bastain.....	283
Law & Frothingham.....	67	Magnesi v. Hazelton.....	288
Lebel v. Paradis et al.....	403	Maher & Aylmer.....	130
Leclere v. Gaherty.....	191	Marcotte v. Falardeau.....	110
Leclere et vir v. Joliette Mutual Fire Ins. Co.....	221, 349	Marcoux v. Ranger dit Henri, & Leroux, opposant.....	164
Lefavre v. Belle.....	298	Martin v. Dominion Oil Cloth Co.....	237
Lefevre, Ex parte.....	253	Martin & Poulin.....	20
Lefebvre v. Proulx.....	64	Massé et al. v. Robillard.....	3, 10
Leggott v. Barrett.....	112, 222	Mathewson v. Bush.....	342
Lemieux v. Cantin.....	158	Mathieu v. Tremblay, & Lionais.....	299
Leon, The.....	319	Mayo v. Preston.....	344
		Mercer case.....	369
		Michaud v. Vesina.....	157

TABLE OF CASES.

VII

Miclette v. Le Maire etc., de la ville de St. Hyacinthe.....	382	Patenande et al. v. McCulloch.....	119
Midland Ins. Co. v. Smith.....	288	Patman v. Harland.....	286
Miller & Coleman et vir.....	268	Perras v. Goyette, père.....	306
Mitchell v. Flanagan.....	110	Perkins v. Martin.....	134
Molsons Bank v. Lionais, & Drummond, T.S.....	183	Picard v. Grosblouis et al.....	280
Molsons Bank v. Lionais, & Lionais, opposant.....	86	Pigeon v. Roussin.....	326
Monette v. Charrette.....	220	Potter v. Warner.....	380
Monk v. Packard.....	175	Poulet v. Launière.....	111
Montpetit v. Peladeau.....	146	Poulin v. Falardeau.....	317
Moore v. Keane et al.....	158	Power v. Ellis.....	114
Morasse v. Baby.....	336	Pratt v. Berger.....	341
Morency v. Fournier.....	191	Prevo-t v. La Banque d'Hochelaga.....	340
Morin v. Berger.....	183	Princess Royal, The.....	120
Morrison es qual. v. McCuaig.....	151	Provost es qual. & Bourdon.....	77
Morrison & The Mayor et al. of Montreal..	25		
Moser v. Snarr.....	48	Radiger, Ex parte, & Beaudry.....	305
Mulholland et al., In re, & Mulholland, Petr	333	Ray et al. v. Lockhart et al.....	194
Municipality of Cleveland & Municipality of Melbourne & Brompton Gore.....	277	Raynor v. Preston.....	241
Munn et al. v. Berger et al.....	218	Reese v. Reese.....	314
Murphy v. Roche.....	175	Reid et al. v. Smith.....	157
Murray v. McShane.....	216	Regina v. Abrahams.....	41
Mutual Fire Ins. Co. v. Desrouselles.....	220	" v. Belieu et al.....	92
		" v. Fennell.....	336
Nadon et vir v. Charrette.....	61	" v. Harper.....	304
Nashville & Chattanooga Railroad Co. v. Sprayberry.....	313	" v. Kaylor.....	198
Neil et al. v. Champoux et al.....	352	" v. Malouin.....	372
Neil v. The Travellers Ins. Co.....	80	" v. Mohr.....	328
Neveu v. Rabeau, and Neveu, T. S.....	44	" v. Most.....	306
Newell v. Whitcher.....	399	" v. Roadley.....	64
Nicholson & Metras.....	281	" v. Salmon.....	64
Nobels' Explosive Co. v. Jones, Scott & Co.	319	" v. Sulis.....	375
Noel & Corporation of the County of Rich- mond.....	125	Remillard v. Cowan.....	111
Northern Assurance Co. & Prevost.....	254	Renaud v. Dussault.....	63
		Benny et al. v. Moat.....	195
O'Dowd v. Brunelle.....	79	Rheaume v. Bouchard.....	55
Osborne et al. v. Paquette.....	50	Rice v. Libby.....	350
Guimet v. Beauchemin.....	53	Robert & The City of Montreal.....	292
Guimet v. Verville.....	233, 239	Robertson v. La Banque d'Hochelaga.....	314
		Robidoux v. Lepine dit Legris.....	70
Pagé, Ex parte.....	146	Robillard v. Société Canadienne Française de Construction de Montréal.....	133
Paige et al. & Evans es qual.....	130	Robinson v. State.....	103
Panneton v. Guillet.....	375	Robitaille v. Drolet.....	240
Paquet, In re, and Canada Guarantee Co.	229	Roblin v. Roblin.....	208
Parcher v. Marathon County.....	284	Rolland v. Citizens Ins. Co., & Lajoie, plff. par rep.....	140
Parsons v. The Citizens Ins. Co.....	385	Ross v. Corrigan.....	248
" v. The Queen Ins. Co.....	385	Ross v. Fitch.....	48
		Ross et al. v. Guilbault.....	415
		Ross v. Vanneck.....	316
		Both v. State of Texas.....	103

Roussillon v. Roussillon.....	121	State v. Littlefield.....	314
Roussin v. Pigeon.....	326	Steel v. Dixon.....	376
Rowan et al. v. Dubord et vir.....	172	Stewart & Brewis.....	203
Roy v. Gagnon.....	352	Strousberg v. Republic of Costa Rica.....	192
Roy v. The Grand Trunk Railway Co. of Canada.....	211	Summers v. Commercial Union Assur. Co.	194
Ruchiski v. De Haven.....	208	Tavernier v. Robert et al.....	131
Ryan v. Ryan.....	95	Temple v. Close.....	92
St. Ann's Mutual Building Society v. Brown.....	184	Temple v. Nicholson et al.....	114
St. Laurent & Regina.....	100, 240	Therien & Wadleigh.....	100
St. Louis Ins. Co. v. St. Louis, Vandalia, Terre Haute & Indianapolis R.R. Co., ..	402	Thibaudeau v. Danjou.....	120
Sansfaçon v. Boucher et al.....	158	Thompson et al. v. City of Montreal.....	327
Savard v. McGreevy.....	248	Thompson et al. v. Currie et al.....	139
Semmelhaack v. Canada Fire & Marine Ins. Co.....	205	Thompson et al. v. Pelletier.....	192
Senecal v. La Compagnie d'Imprimerie de Québec.....	414	Toomes, Estate of.....	314
Seybold, In re, & Evans, claimant.....	138	Tomline v. Tyler.....	170
Sharpley v. Dautre et vir, & O'Dowd, T. S.	185	Tremblay v. Jodoin et al.....	359
Shaw v. City of Montreal.....	327	Trenholm v. Mills.....	79
Shaw & Mackenzie et al.....	89	Trout v. Moulton.....	48
Ship Covilita v. Perry.....	264	Trust & Loan Co. of Canada v. The Right Rev. the Lord Bishop of Montreal....	338
Shorey et al. v. Bush.....	342	Turcotte es qual. v. Nacké.....	375
Sicotte v. Braseau, & Prevost et al.....	350	United States v. Farrington.....	225
Sidey v. City of Montreal.....	327	United States, <i>ex rel.</i> Southern Express Co. v. Memphis & Little Rock R. Co.....	376
Simmons & Mitchell.....	75	Vandal v. Prowse.....	2
Sleeth v. Harbour Commissioners of Mon- tréal.....	2, 126	Vezina v. New York Life Ins. Co.....	230
Société Permanente de Construction & Robinson.....	38	Victoria Mutual Fire Ins. Co. v. Carpenter.	351
Société Permanente de Construction du district d'Iberville v. Rossiter.....	268	Wagenseller v. Simmers.....	408
Sorelle v. Western Union Tel. Co.....	273	Wakefield & Barnsley Banking Co. v. Nor- manton Local Board.....	343
Smart & Corporation of Village of Hoche- laga.....	255	Walker v. City of Montreal.....	215
Smith v. Merchants Bank.....	200	Walker v. State.....	313
Snowball v. Stewart.....	92	Walter v. Head.....	291
Southern Express Co. v. Louisville & Nashville R. R. Co.....	16	Walter v. Howe.....	376
Spaight v. Tedcastle.....	304	Wardell v. Union Pacific R. Co.....	376
Sprout v. Pillsbury.....	360	Watson v. Smith et al.....	402
Stabler v. Commonwealth.....	103	Wheeler v. Marchant.....	257
Stafford et al., In re, & Joseph, claimant..	51	Whitman & Corporation of the Township of Stanbridge.....	406
Starr v. McDonald et al.....	301	Whitmore v. Farley.....	376
State v. Davis.....	103	Williams v. Hartford Ins. Co.....	314
State v. Ellison.....	64	Williams v. Williams.....	286
State of North Carolina v. Hiffner.....	280	Windsor Hotel Co. v. Lewis et al.....	331
State v. Kilgore.....	103	Worden v. City of New Bedford.....	360
		Wright v. Corporation of Stoneham & Tew- kesbury.....	280
		Wright v. Cotton.....	175
		Zink, <i>Ex parte</i>	64

The Legal News.

VOL. IV. JANUARY 1, 1881. No. 1.

A YEARS WORK.

In connection with the pressure upon our Quebec Court of Appeal, the following, from the *Alb. Law Journal*, about the New York Court of Appeals, will be read with interest:—

"Our Court of Appeals, after a heroic struggle, have substantially cleared their year's calendar at the end of the year—a feat never before accomplished by this Court. They have heard every cause ready for argument, and have decided 583 of the 608 causes on the calendar. They have handed down 560 decisions during the year. This is a great work, and this statement does not include the myriad motions heard and decided. The Court sit, in hearing and consultations, seven hours a day, five days in the week, and write their opinions in the evenings, on Saturdays, and in vacation. It is difficult to see where they get any time for reflection. The new calendar will number over 400 with an unusually large proportion of preferred causes. It is a serious question how long men can live under such a burden as the present, not to say how long, with the constantly increasing business, their decisions can continue to deserve the general approbation which they now receive."

REMARKABLE LONGEVITY.

Some time ago, the case of Mr. Azgill Gibbs, of Rochester, N.Y., was briefly noticed in this journal (p. 138 of vol. 3). Mr. Gibbs was said to be the oldest lawyer in the world, engaged in actual practice. This example of vigor and longevity is better authenticated than the majority of such cases, for it happens that Mr. Gibbs' son is editor of Hall's *Journal of Health*, and the December issue of that periodical says:—

"Mr. Gibbs is now in his 94th year, and for seventy years has never been absent from his office for a single day on account of illness. He is to-day in the enjoyment of perfect health and in possession of all his faculties. This wonderful longevity and freedom from illness

are the direct result of a course of living which this journal has advocated for more than a quarter of a century..... The secret of this long exemption from any serious disease and of this green old age is an open one. It is simply the avoidance in daily life of such things as all the world knows impair the health and strength of mankind and bring on decay. Mr. Gibbs has never used tobacco in any form, and as for intoxicating liquors, he is ignorant of their taste. His diet has always been ample but simple. Fond of the pleasures of the table, he enjoys them in moderation. An active and laborious life has been sweetened and prolonged by a rigid enforcement of the homely but golden rule, 'Do not fret.'"

ONTARIO JUDICATURE ACT.

A Committee appointed to consider the proposed new Judicature Act of Ontario, has reported several suggestions in amendment to the bill as follows: First, The abolition of all unnecessary distinctions between the courts of law and equity, even in the names of the courts. Second, The decentralization as far as possible of the business of the courts, and, with that object, the establishment of the divisions of the proposed High Court in such places in the East, Centre and West of the Province as shall be most convenient and suitable, with the Court of Appeal at Toronto. Third, A practice which shall include all forms of actions, and under which actions shall be conducted, as far as possible, from their commencement to their termination, in the locality in which the litigation shall arise.

SIR JAMES W. COLVILLE.

The decease of another prominent English Judge is reported. The Right Hon. Sir James W. Colville, who delivered the judgment of the Privy Council in *Molson & Carter* on the 27th of November, died suddenly at his residence, Rutland Gate, on the 5th December, aged 70. He was the eldest son of the late Andrew Colville, of Ochiltree and Craigflower (for many years Governor of Hudson's Bay Territory), by his second wife, sister of the first Earl of Auckland, Governor-General of India; he was educated at Eton and Trinity College, Cambridge. In 1848 he was appointed Judge of the Su-

preme Court at Calcutta, and in 1855 Chief-Justice of the same Court; in 1871 he was appointed a member of the Judicial Committee of the Privy Council. He was a grandson of Isabella (grand niece and heiress of the last Lord Colville, of Ochiltree), daughter of Andrew Blackburn, a leading merchant of Glasgow in 1770.

THE COURT OF QUEEN'S BENCH.

A conversation took place (Dec. 21) during the recent term of the Court of Appeal, with reference to the postponement of cases which are called when there are only four Judges on the Bench. A case which had been so postponed, during the illness of Mr. Justice Ramsay, having been called,

Mr. Justice RAMSAY remarked that the law made the quorum to consist of four Judges, and it should not be supposed that more were necessary. The Court had to get through one-fifth more work in each of the next two years than it had been able to get through on the average of the last seven years, and it was wasting the strength of the Court to insist on having all the five Judges present in every case. There was not another Court in the world, so far as his Honor was aware, where the whole Court sits in every case. There was a rule for supplying an *ad hoc* Judge in certain cases, but there was not a word in the law to require that five Judges must be present, and he could not conceive how they had fallen into the practice of the whole Court sitting. What would be said in the Privy Council, if it were proposed to adjourn the Court because one of the Judges was absent?

Mr. BETHUNE, Q. C., said the object had been to avoid an equal division of the Court, but the Court had been careful not to lay down the rule that a postponement could be claimed if five judges were not present.

Mr. Justice MONK observed that as far as he was concerned, he would be only too anxious to have the assistance of a full Bench.

Mr. Justice RAMSAY said they had laid down the contrary rule, of proceeding with four Judges, six years ago, and although there might occasionally be a re-hearing owing to it, yet that could be arranged without difficulty by submitting the case to a fifth Judge in Chambers. He considered this point of great im-

portance, because the Court was now pressed to the last extremity, and it was hardly possible for the Judges to go on much longer, without danger of some of them breaking down.

Mr. Justice MONK.—I can only say that when an important case comes before the Court, it is a great satisfaction to me to have five Judges present. It is an assistance to the Court, and probably obviates some difficulties.

Sir A. A. DOBSON, C. J.—I may say that we have endeavored to meet the wishes of the Bar in the matter.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, December 29, 1880.

Before TORRANCE, J.

SLEWTH V. HARBOUR COMMISSIONERS OF MONTREAL.
Harbor Commissioners—Obstructions on the Wharf.

The action was to revendicate a quantity of wood. The defendants pleaded that the wood had been placed on the wharf under their control, and as it obstructed the thoroughfare, they had removed it as authorized by their by-laws Nos. 42 and 43, and they claimed a right of retention for their disbursements, \$20.21, until the payment thereof to them.

PER CURIAM. I am quite satisfied on the evidence of record that the plaintiff was in fault here. There was an undoubted obstruction of the thoroughfare, and in the removal of the wood by the defendants they were only doing their duty. The plaintiff by his note of 18th September, 1879, showed that he knew that he was in default, and made apologies promising a removal of the obstruction. Plea maintained.

McCorkill for plaintiff.

Abbott & Co. for defendants.

SUPERIOR COURT.

MONTREAL, December 29, 1880.

Before TORRANCE, J.

VANDAL V. PROWSE.

Damages—Negligence—Roofer—Metal falling from roof.

This was an action of damages for an injury to plaintiff by pieces of metal falling from the roof of a house upon plaintiff's head, through

the negligence of one of defendant's workmen making repairs to a roof. The defendant tendered \$50.

PER CURIAM. This is entirely a question of evidence. There are two doctors' bills which should only be allowed in part so far as the defendant is concerned. There is no specific damage proved by loss of practice as a lawyer but I do not consider that the \$50 offered by defendant is sufficient. It is to be regretted that the workman through whose negligence this action has arisen is not to bear all the consequences of his negligence. As it is, the Court has to assess the damages which should reasonably be paid by the master, who is responsible for the act of his journeyman. The Court has before it the case of *Glass v. Deblois*. That was a much more serious case, the plaintiff narrowly escaping with his life, and the damages given were only \$200. Here the damages are assessed at \$100 and costs.

Dukamel, Pagnuelo & Rainville for plaintiff.
Bethune & Bethune for defendant.

COURT OF REVIEW.

MONTREAL, November 30, 1880.

JOHNSON, OLIVIER, BOURGEOIS, JJ.

MASSE et al., Petitioners, and ROBILARD, Respondent.

(Quebec Controverted Elections Act, 1875).

Clerical Influence in Elections.

A priest or clergyman may take the side of a candidate in an election, and support it by all lawful means, even from the pulpit. But if a priest does any unlawful act, such as using intimidation by refusing the sacraments to a person who will not vote as he wishes, he will be deemed the agent of the candidate, and the fact that he has committed the unlawful act in the exercise of his priestly office, will not protect the candidate from the consequences of such unlawful act on the part of an agent.

JOHNSON, J. This is an Election Petition from the County of Berthier, and the Petitioners alleged in the first instance almost every possible species of infraction of the provisions of the election law; but it is now perfectly understood, and it was so expressly stated at the long and careful argument of counsel on one side and on the other, that the present preten-

sions of the Petitioners are reduced to one class of offences against the Election Act, viz., the class of offences or corrupt practices mentioned in the 258th section of that statute, and called by the general name of "undue influence;" and they allege this undue influence to have been practised, not only by the Respondent's agents, but also with his own personal knowledge and consent; and they pray that the election may be avoided, and the Respondent be disqualified under the 267th and the 268th sections.

The election in question took place on the 1st of March, 1878, and the Respondent was returned as duly elected.

The Petition was presented on the 8th of June, 1878, and the Respondent, on the 14th, filed a general answer in fact and in law, and there was a hearing on that, and the Petitioners moved for particulars, which were furnished on the 5th of January, 1880. Some or most of these particulars related to the general charges not now insisted upon; but with respect to the particulars numbered from 6 to 18 inclusive, they related to the charges which are now before us, and to which, as I said before, the consideration of the case is now to be restricted. These particulars refer to the acts of six Roman Catholic clergymen of the County, of whom five are named; and, though in discussing this case, I use my own native tongue as being more familiar to me, yet, in a matter of so much importance, it may be desirable that the exact pretensions of the Petitioners in their own language, as they appear in the record, should be repeated, and that nothing should be risked by translation as to their exact meaning. They are as follows:—

INFLUENCE INDUE.

6ième particularité:—"Les Révérends Messieurs Clément Loranger, curé de la Paroisse de Lanoraie, Jean-Baptiste Champeau, curé de la Paroisse de Berthier, Urgèle Archambault, curé de la Paroisse de St. Barthélemy, Joseph St. Aubin, curé de la Paroisse de St. Norbert, André Brien, curé de St. Cuthbert, ont, immédiatement avant la dite élection, et pendant icelle, organisé un système général d'intimidation, dans le but d'influencer indûment le vote de tous les électeurs du dit District Electoral de Berthier, et particulièrement le vote de tous les électeurs des dites paroisses, situées dans le dit District Electoral de Berthier, en faveur du Défendeur et contre Louis Sylvestre, Ecuier, l'autre candidat opposé au défendeur, et cela en dénonçant en leur qualité de pasteurs des dites

paroisses et de Prêtres de la Religion Catholique Romaine, publiquement et privément, soit en chaire, à leurs prônes de paroisse, les dimanches et fêtes pendant les offices divins, soit au confessional en confessant leurs ouailles ; soit en d'autres lieux où ils prétendaient, en leur dite qualité de pasteurs, de guider, par leurs conseils et leurs avis spirituels, la conscience de leurs paroissiens, aux électeurs ou aux épouses ou filles des électeurs des dites paroisses et du dit district électoral de Berthier, qui sont tous ou presque tous des personnes appartenant à la religion catholique romaine, le parti libéral auquel appartenait le candidat Sylvestre, comme un parti d'impies, de révolutionnaires et d'athées, professant des principes condamnés par les dogmes, les préceptes et la discipline de l'Eglise Catholique Romaine ; comme un parti condamné par et anathème à la Religion et à l'Eglise Catholique Romaine ; en menaçant en même temps, et aux mêmes lieux et occasions leurs paroissiens de peines spirituelles et temporelles, des malédictions de Dieu, des anathèmes de l'Eglise Catholique Romaine, et de l'enfer s'ils votaient pour ou appartenaient au dit parti libéral et s'ils votaient pour le candidat Sylvestre ; et s'ils ne votaient pas pour le Défendeur ou pour le parti conservateur auquel il appartenait ; en les menaçant de leur refuser l'administration des sacrements de l'Eglise Catholique Romaine et de fait en leur refusant l'administration de tels sacrements si leurs paroissiens n'écoutaient pas leurs conseils et méprisaient leurs avis qu'ils prétendaient donner comme susdit en leur dite qualité de pasteurs ; enfin en intimidant la conscience des dits électeurs et les obligeant sous peine de ne pas participer aux avantages de la religion à laquelle ils appartenaient, et d'être exclus de l'Eglise Catholique Romaine ; de voter pour le Défendeur et de ne pas voter pour le candidat Sylvestre, et ce, à la connaissance, avec les consentement, autorisation, approbation et participation du Défendeur."

7ième particularité :—" A Lanoraie, dans le dit district électoral de Berthier, pendant la dite élection immédiatement avant en vue d'icelle et avant la votation, le Révérend Messire Clément Loranger, prêtre, curé de la dite paroisse de Lanoraie, et l'un des principaux agents du Défendeur, a dit et déclaré en chaire, à ses prônes des dimanches et fêtes, au service divin du matin, dans l'église de la dite paroisse de Lanoraie, en présence d'une grande partie de ses paroissiens assistant au dit service divin, en substance, d'abord :—" que les électeurs de Lanoraie ne devaient pas se prononcer trop vite pour voter à la dite élection ; qu'il reviendrait sur le sujet ; qu'ils devaient attendre pour cela qu'il leur en parlât de nouveau " et ensuite :—" que le parti libéral " (c'est-à-dire le parti auquel appartenait le candidat opposant le Défendeur) " était le mauvais parti, et qu'ils devaient suivre le clergé qui combattait ce parti ; que les prêtres qui soutenaient ce parti étaient si rares qu'on pouvait les compter sur les doigts, et qu'il en resterait encore ; que les prêtres avaient droit de parler de politique et des élections en chaire ; et que le clergé garderait toujours son influence, en dépit de ce que pourraient faire les libéraux pour leur fermer la bouche," donnant clairement à comprendre, tel que, de fait, ça été compris, que le parti libéral était défendu et condamné par le

clergé et l'Eglise Catholique Romaine, et qu'en y appartenant, un électeur catholique péchait et ne pouvait faire son salut, et ce, dans le but d'intimider tous les électeurs Catholiques Romains, de la dite Paroisse de Lanoraie à qui il parlait et s'adressait là et alors, entr'autres : Thimothé Dufour Latour, Antoine Caisse, Joseph Marion, Louis Marion, Pierre Champagne, Edouard Champagne, Cyrille Ducharme, Daniel Bonnin, Joseph Laroche, Louis B. Champagne, Maxime Rondeau, Honorius Paquet, Pierre Bergeron, Israël Robillard, Louis Lachapelle, Narcisse Nadeau, Maxime Larancone, Pierre Fafard, tous électeurs habiles à voter à la dite élection, et dans le but d'influencer indûment leur vote à la dite élection.

8ième particularité : A Lanoraie susdit, pendant la dite élection, immédiatement avant et en vue d'icelle et avant la votation, le dit Révérend Messire Clément Loranger a dit et déclaré à Adèle Bonin, épouse de Antoine Caisse, Cordélie Hervieux, épouse de Joseph Bonnin, Rose Laroche, épouse de Joseph Nadeau, Hermine Caisse, épouse de Alexis Labrecque, Emélie Hervieux, épouse de Alfred Lavallée, Ismène Rondeau, veuve de feu Alexis Desrosiers, Zoé Hervieux, maîtresse d'école, Théotiste Roy, épouse de Alexis Desrosiers, Félicité Harpin, épouse de Narcisse Nadeau, Emélie Matte, épouse de Alexis Pagé, Agnès Plante, épouse de Jean-Baptiste Pagé, Thérèse Tarte, épouse de Gonsague Joly, et Rose Caisse, épouse de Norbert Harpin, tous Catholiques Romains, ses paroissiens et électeurs habiles à voter à la dite élection, en substance ce qui suit, savoir :—" que c'était un devoir de conscience, pour chacune d'elles, les susdites femmes de travailler et d'employer tous les moyens à leur disposition pour faire abandonner le dit parti libéral par leurs dits maris, par leurs parents et amis et tous ceux sur qui elles pouvaient exercer quelque influence, parce que c'était le mauvais parti, et que cela était propre à attirer toutes sortes de malédictions et de malheurs sur elles et leurs familles, et que c'était à cela qu'elles devaient attribuer les malheurs qui auraient pu arriver déjà dans leurs familles ; et que c'était dû aux scandales et aux mauvais exemples causés par leurs maris à leurs enfants en s'entêtant à appartenir au parti libéral, malgré le clergé et leur curé ; " et ce, dans le but d'intimider les dits électeurs sus-nommés et d'influencer indûment leur vote à la dite élection ; et là et alors les susdites femmes ont rapporté et répété les dites paroles à chacun leur dit mari, parents et amis selon les recommandations et sollicitations du dit Révérend Messire Clément Loranger, dans le même but susdit.

9ième particularité : " Au dit lieu de Lanoraie, le dit Révérend Messire Clément Loranger, pendant la dite élection et immédiatement avant et en vue d'icelle, et avant la votation a dit et déclaré à Xiste Stingue et Anselme Stingue, tous deux Catholiques Romains, ses paroissiens, et électeurs habiles à voter à la dite élection, en substance, ce qui suit, savoir :—" Que le dit parti libéral était un mauvais parti, condamné par le clergé et l'Eglise Catholique ; qu'ils ne devaient pas en conscience voter pour le candidat Sylvestre qui appartenait à ce parti, mais pour le défendeur, qui appartenait au bon parti, le parti conservateur, avec lequel marchait tout le clergé Catholique ; que sans cela, ils ne pourraient faire leur Religion et

leur salut ; ” et ce, dans le but d'intimider les susdits électeurs et d'influencer indûment leur vote à la dite élection.

10ième particularité : “ A Berthier susdit pendant la dite élection immédiatement avant et en vue d'icelle et avant la votation, le Révérend Messire Jean Baptiste Champeau, prêtre curé, de la dite paroisse de Berthier, et l'un des principaux agents du Défendeur, en chaire, aux prônes, des dimanches et fêtes, au service divin du matin, a dit, déclaré et prêché, en substance ce qui suit, et cela en présence d'une grande partie de ses paroissiens, assistant au dit service divin, dans l'Eglise de la dite paroisse de Berthier, savoir “ qu'il ne pourrait pas absoudre un pénitent qui s'accuserait d'être en faveur de l'abolition du Conseil Législatif ” (voulant parler du conseil Législatif de la Province de Québec pour l'abolition duquel le candidat opposant le défendeur s'était notoirement prononcé ainsi que son parti) “ parceque ” ajoutait-il, “ ce Conseil était d'institution divine, ce qu'il prouvait en citant la Sainte Bible ; que les rouges, ” (appellation généralement donnée aux électeurs du même parti que le candidat opposé au défendeur) “ en travaillant à l'abolition du Conseil Législatif, travaillaient contre les Saintes-Ecritures et la Religion ; que le Lieutenant-Gouverneur Letellier était un rouge ; que le premier ministre Joly ” (supporté par le candidat opposé au défendeur) “ était un Suisse ” c'est-à-dire un apostat “ et un Protestant supporté par tous les protestants que Monseigneur Conroy ” (prêlat délégué par le Pape au Canada) “ loin de donner gain de cause aux libéraux, ” (ceux dont le candidat opposé suivait le parti) “ était venu pour les condamner et comme le Pape Pie IX, il défendait de transiger avec le libéralisme ; qu'il espérait leur en avoir dit assez pour leur faire bien comprendre pour quel parti ils devaient voter ; qu'il avait reçu une circulaire lui ordonnant d'instruire le peuple et qu'il allait le faire, malgré qu'un jugement de la Cour Suprême restreignait la liberté des prêtres ; qu'il n'avait pas droit d'après ce jugement de faire des menaces à cause de la politique mais qu'il dirait tout ce qu'il pourrait dire, sans se compromettre aux yeux des juges libéraux qui se permettaient de juger les prêtres ; ” et ce, en parlant et en s'adressant à tous les Catholiques Romains, ses paroissiens entr'autres, à Alfred Coutu, Olivier Fréchette, Elie Pellerin, Euclide Coutu, Charles Coutu, Louis Roy, Alexis Bellisle, Charles Gravel, Sifroid Denis, Eugène Pelland, tous électeurs habiles à voter à la dite élection, dans le but de les intimider et d'influencer indûment leur vote à la dite élection.”

11ième particularité : “ Au dit lieu de Berthier pendant la dite élection, immédiatement avant et en vue d'icelle et avant la votation, le dit Révérend Messire Jean-Baptiste Champeau a refusé de confesser, d'absoudre, et d'admettre à faire leurs Pâques, plusieurs Catholiques Romains, ses paroissiens, uniquement parce qu'ils appartenaient au parti libéral politique, c'est-à-dire au parti du candidat opposé au Défendeur, et qu'ils refusaient de l'abandonner pour suivre le parti du Défendeur, ou de voter pour lui à la dite élection, entr'autres : Louis Roy, Alexis Bellisle, Charles Gravel, Sifroid Denis et Eugène Pelland, tous électeurs habiles à voter à la dite élection, et ce, dans le but de les intimider et d'influencer indûment leur vote à la dite élection.

12ième particularité : “ Au dit lieu de Berthier, pendant la dite élection, immédiatement avant et en vue d'icelle, et avant la votation, le dit Révérend Messire Jean-Baptiste Champeau a dit à plusieurs catholiques Romains, ses paroissiens, qu'il ne les confesserait, les absoudrait, les admettrait à faire leurs Pâques qu'à la condition qu'ils abandonnassent le dit parti libéral politique et le candidat opposé au Défendeur pour voter en faveur de ce dernier, ou qu'ils s'abstiennent de voter à la dite élection ; et que sans cela, il refusait de, et ne pouvait les confesser, absoudre et admettre à faire leurs Pâques, entr'autres à Louis Roy, Alexis Bellisle, Charles Gravel, Sifroid Denis et Eugène Pelland, tous électeurs habiles à voter à la dite élection, et ce, dans le but de les intimider et d'influencer indûment leur vote à la dite élection.

13ième particularité : “ A St. Norbert, dans le district électoral de Berthier, pendant la dite élection, immédiatement avant et en vue d'icelle et avant la votation, le Révérend Messire Joseph St. Aubin, prêtre, curé de la dite paroisse, et l'un des principaux agents du Défendeur, en chaire, aux prônes des dimanches et fêtes dans l'église de la dite paroisse de St. Norbert, en présence de la plus grande partie de ses paroissiens, a dit, déclaré et prêché, en substance ce qui suit, savoir : “ que le parti libéral ” (celui auquel appartenait le candidat opposé au Défendeur) “ était un mauvais parti, condamné par l'Eglise Catholique Romaine ; que ce parti avait à sa tête, dans la personne du premier ministre Joly, un Protestant et même un Suisse ” (apostat) “ et qu'il était impossible pour un catholique de supporter ce parti ; que le supporter ce serait faire dommage à la Religion Catholique et la renverser ; que le libéralisme politique et le libéralisme catholique étaient une seule et même chose, condamnable et condamnée par l'Eglise Catholique, que le parti conservateur, ” (celui auquel appartenait le Défendeur), “ était le seul bon parti, que l'autre était le chemin de l'enfer ; ” et ce en parlant et s'adressant à tous les catholiques Romains, ses paroissiens, entr'autres à François-Xavier Dubeau, Adolphe Roch, Thomas Fréchette, David Fréchette et George Fréchette, tous électeurs habiles à voter à la dite élection, dans le but de les intimider et d'influencer indûment leur vote à la dite élection.”

14ième particularité : “ Au dit lieu de St. Norbert, pendant la dite élection, immédiatement avant et en vue d'icelle, et avant la votation, le dit Révérend Messire Joseph St. Aubin a dit à George Fréchette, un de ses paroissiens et électeur habile à voter à la dite élection, en substance, ce qui suit, savoir :— “ Qu'il attribuait le malheur dont était affligée la famille du dit George Fréchette, dans la personne d'un de ses membres frappé d'aliénation mentale, au fait que le chef de cette famille appartenait au parti libéral ; et que si le dit George Fréchette persistait dans ses opinions politiques en faveur de ce parti il lui arriverait les plus grands malheurs ; et ce dans le but d'intimider le dit George Fréchette et d'influencer indûment son vote à la dite élection.”

15ième particularité : “ Au dit lieu de St. Norbert, pendant la dite élection, immédiatement avant et en vue d'icelle, et avant la votation, le dit Révérend Messire Joseph St. Aubin a sollicité et cabalé, en faveur du défendeur, plusieurs électeurs habiles à voter

à la dite élection, ses paroissiens, en leur déclarant et disant en substance, ce qui suit, savoir : " Que le parti conservateur " (celui auquel appartenait le défendeur) " était le parti du Bon Dieu ; qu'ils devaient, en conscience, voter avec ce parti pour le défendeur ; que le parti libéral (celui auquel appartenait le candidat opposé au défendeur) " était le méchant parti ; qu'ils devaient abandonner ce parti ; que s'ils persistaient ou s'obstinaient à le suivre, il leur arriverait de grands malheurs à eux et à leurs familles, et ce entr'autres à François-Xavier Dubeau, David Fréchette, Adolphe Roch, Thomas Fréchette et George Fréchette, dans le but de les intimider et d'influencer indument leur vote à la dite élection.

16ième particularité. " A St. Barthélemy, dans le dit district électoral de Berthier, pendant la dite élection, immédiatement avant et en vue d'icelle, et avant la votation, le Révérend Messire Urgel Archambault, prêtre, curé de la dite paroisse de St. Barthélemy, et le Révérend Messire Brien, vicair ou assistant curé de la dite paroisse, tous deux agents du Défendeur, en chaire, aux prônes des dimanches et fêtes, dans l'Eglise de la Paroisse, en présence de la plus grande partie de leurs paroissiens, ont dit, déclaré et prêché, en substance ce qui suit, savoir : " Que le dit parti libéral était impie, suisse, " (apostat) " et révolutionnaire ; que c'était le mauvais et le méchant parti ; le parti condamné par l'Eglise ; et qu'ils défendaient absolument à leurs paroissiens de voter en faveur de ce parti : que personne ne les empêcheraient de parler, ni Evêque, ni Pape, que ceux qui disaient qu'on allait les arrêter de parler avaient menti, et que quand ils disaient MENTI, c'était MENTI, qu'il n'y avait qu'un seul bon parti et qu'il fallait absolument le suivre, le parti conservateur, que le libéralisme catholique et le libéralisme politique étaient une seule et même chose, condamnable et condamnée par l'Eglise Catholique, que les curés des autres Paroisses qui parlaient ou agissaient autrement qu'eux sur cette question, étaient des judas, des mauvais prêtres et des prêtres apostats ; que les libéraux de la dite paroisse étaient des SERPENTS ; que ceux qui ne les écoutaient pas, en voulant être toujours libéraux étaient des têtes croches et des enfants du diable ; " et ce, parlant et s'adressant à tous les catholiques Romains de la dite Paroisse, entr'autres, à Pierre Dumontier, Euchariste Ayotte, Désiel Rémillard, Bernard Ribardy, Elie Dumontier, Gilbert Comtois, Edouard Béland, Joseph Dumontier, Jérémie Plante et Adolphe Lajoie, tous électeurs habiles à voter à la dite élection, dans le but de les intimider et d'influencer indument leur vote à la dite élection."

17ième. particularité : " Au dit lieu de St. Barthélemy, pendant la dite élection immédiatement avant et en vue d'icelle, et avant la votation, les dits révérends Messires Archambault et Brien ont refusé de confesser, d'absoudre et d'admettre à faire leurs Pâques plusieurs Catholiques Romains, leurs paroissiens, uniquement parce qu'ils appartenaient au dit parti libéral politique, c'est à dire au parti du candidat opposé au Défendeur, et qu'ils refusaient de l'abandonner pour suivre le parti du Défendeur ou de voter pour lui à la dite élection, entr'autres, Gilbert Comtois, Pierre Dumontier, Edouard Béland, Adolphe Lajoie, Jérémie Plante et Joseph Dumontier, tous électeurs habiles à

voter à la dite élection, et ce, dans le but de les intimider et d'influencer indument leur vote à la dite élection.

18ième. particularité : " Au dit lieu de St. Barthélemy, pendant la dite élection, immédiatement avant et en vue d'icelle et avant la votation, les dits Révérends Messires Archambault et Brien, ont dit à plusieurs Catholiques Romains, leurs paroissiens, qu'ils ne les confessaient, les absoudraient et les admettraient à faire leurs Pâques qu'à condition qu'ils abandonnassent le dit parti libéral politique, et le candidat opposé au Défendeur, pour voter en faveur de ce dernier, ou qu'ils s'abstiennent de voter à la dite élection ; et que, sans cela, ils refusaient et ne pouvaient les confesser, absoudre et admettre à faire leurs Pâques, entr'autres Gilbert Comtois, Pierre Dumontier, Edouard Béland, Adolphe Lajoie, Jérémie Plante et Joseph Dumontier, tous électeurs habiles à voter à la dite élection, et ce, dans le but de les intimider et d'influencer indument leur vote à la dite élection."

Now, though it was desirable, in order to avoid any sort of misapprehension, that the precise charges brought forward by the Petitioners should be stated in the terms they themselves have chosen, and in their own language, I think it may abbreviate, without in any degree changing or impairing the real extent or significance of these charges, if I give, at once, the substance of them. First, it may be said of them all indiscriminately that they are levelled at persons who are alleged to have been acting for another : that is to say, as agents of the Respondent in that election. Then they are brought against persons of the clerical order. Then they profess to state or describe what those persons did. The mere reading of these charges will have sufficed to show that some of them are of a very general character indeed. Some of them, in fact, a very great part of them, assert and charge things that undoubtedly could not constitute " undue influence " in the sense of the law ; for there certainly is, as we shall presently have an opportunity of elucidating, such a thing as legitimate influence, as well as such a thing as " undue influence," whether exercised by clergymen or by others. Some of them, again, charge specific acts, which would as undoubtedly come under the prohibition of the Statute. We shall have first of all then, to deal with the question of agency ; then, we shall have to deal with acts ; the extent of proof of the acts that are alleged against these agents, and the legal character of those acts as affecting, not only the election, but also the candidate personally. As

to the fact of agency itself, it must be gathered from the circumstances and conduct of the parties. As to the law on the subject, everyone is agreed at the present day that the agency in such a case is not the common law agency at all. In the Taunton case, Mr. Justice Grove said, after pointing out the difficulty of an exact definition of what it was, and the failure of two or three attempts already made in the Norwich case, in the Westbury case, and in the Tamworth case, to define the relation: "All agree that the relation is not the common law one of principal and agent, but that the candidate may be responsible for the acts of one acting on his behalf, though the acts be beyond the scope of the authority given, or, indeed, in violation of express injunction." And in the Boston case the same judge said: "The law has decided that a candidate at an election is responsible for the acts of agents who are not, and would not necessarily be agents under the common law of agency. At common law, a person is only responsible for such acts of his agents as are within the scope of the authority which he has given to those agents. For instance, if I authorise a man to buy a horse for me, I am responsible for his conduct about the purchase of that horse; but if that man whom I tell to buy a horse for me, goes and sells a farm of mine, I am not responsible for the act. That is putting it in a very simple form; but with regard to election law, the matter goes a great deal farther, because a number of persons are employed for the purpose of promoting an election, who are not only not authorized to do corrupt acts, but who are expressly enjoined to abstain from doing them, nevertheless the law says that if a man chooses to allow a number of people to go about canvassing for him, generally to support his candidature, to issue placards, to form a committee for his election, and to do things of that sort, he must, to use a colloquial expression, take the bad with the good. He cannot avail himself of these people's acts for the purpose of promoting his election, and then turn his back, or sit quietly by, and let them corrupt the constituency. Therefore the law carries the responsibility of a member of parliament for the acts of the agents who are instrumental, with his assent, in promoting his

election, a good deal further than the mere common law of agency."

But it is not necessary to go into authorities on this subject. Everyone who takes part in an election in good faith, to favor and promote the election of a candidate, becomes *ipso facto* the agent of such candidate. This was the ruling of Judge Taschereau in our Supreme Court in the election case of *Brassard v. Langevin*,* and its soundness is beyond question. We attach great importance to the words "*in good faith*" in the definition by the learned judge, because without it a candidate would be liable to be unseated by the acts of an enemy who might pretend to be his agent; but with this single limitation that we must have evidence to clearly repel any idea of adverse interest in the person acting, we accept the definition without the slightest hesitation, and apply it to the present case. We have next to look, then, at the evidence of agency in these several persons or in any of them. We consider that the evidence on this subject is perfectly decisive. We will refer first to the charge against the Rev. Curé Champeau in relation to this question of agency, because it was the first presented to us in the course of the argument. The reverend gentleman tells his own story, and of course it cannot be doubted. He takes the position of a perfectly honest man, who is unconscious of having done any wrong whatever. He openly proclaims his principles, and his right to support them. All this is well enough, and nobody questions his right, or the right of any or all of the members of his order to profess and practice, within the limits of the law, the principles they have honestly adopted and honestly stick to; but we are only on the question of agency as yet; and I was merely observing, as regards this question of agency, that the Rev. Mr. Champeau, with his undoubted honesty, and the courage of his opinions, tells us something on this question of agency that appears of a very decisive description. The respondent brought him a letter from the Rev. Mr. Loranger. The letter is not to be had; but the contents are not uncertain. It announced the candidature of Mr. Robillard—a subject that had evidently been before that discussed between the Rev. Mr. Champeau and the Rev. Mr. Loranger. Mr. Champeau read the letter; the

* 2 Can. Sup. Ct. Rep. 319.

witness Charles Mousseau says he read it not aloud but to himself, and read it twice, and after having done so, the candidate seemed to wish to get it back; but the curé said, I will keep it, and make some observations next Sunday: (*"Je la garde, et je commenterai dimanche prochain."*) Now we take it to be quite impossible for any fair-minded person to misapprehend the real character of all this. Here was a candidate bearing a letter about his own candidature, written by Mr. Loranger, and addressed to Mr. Champeau. The latter reads it, and makes an answer showing that the bearer perfectly understood the contents of the letter, otherwise the answer would have had no significance. It is the case, plainly, of a candidate taking a letter from one gentleman who was in his interest to another who was likewise in his interest; and the letter suggested something to which that other assented, not only assented at the time by so expressing himself, but confirmed and assented afterwards by his subsequent acts, to which I do not now more particularly refer; but we say, that the only view we can take of the thing without doing violence to our reason and judgment, exercised in a fair and common sense manner, is that from that moment, Mr. Loranger and Mr. Champeau appear to have been, in the eye of the law, agents for that election of the party now respondent here; and we cannot doubt it even from what passed at the time the letter was delivered; and still less can we doubt it in the face of the evidence of Pierre Beliveau, who says in the most distinct manner that he heard from the Respondent's own mouth the admission that he had the support of Mr. Champeau and Mr. Loranger, besides other clergymen and laymen whom he named; adding that with such support as that he was certain to win. Without going any further, then, in search of evidence of agency, but confining ourselves to the cases of Mr. Champeau and Mr. Loranger, we hold that up to this moment we have clear proof of the character in which both of those reverend gentlemen acted in that election. We do not go on at once as to the proof of agency in any of the other gentlemen named, because, perhaps, it may not be necessary to do so for the present; and we prefer to confine ourselves now to the case of Mr. Champeau, whose agency is clearly proved. We now come (the question of agency

being settled, at least, as far as two of the persons charged are concerned), to the acts themselves. I have said already that some of these charges are general, some specific, and some have not the legal requirements of "undue influence."

[Continued on Page 10.]

RECENT ENGLISH DECISIONS.

Vendor and Purchaser—Interest on Purchase Money.—A purchaser who, before completion of the purchase, exercises acts of ownership over the land agreed to be purchased, must pay interest on the purchase-money pending delay in the completion of the contract, although the delay be caused by the vendor, and the land is untenanted, so that he receives no rents nor profits from it.—*Ballard v. Schutt*, L. R. 15 Ch. D. 122.

Copyright in Engraving—Chromo printed wool-work pattern—Protection of design.—A chromo printed Berlin wool-work pattern is not a practical copy of an engraving from the same design. An advertisement by the owner of the copyright of an engraving, and not of the design, warning print sellers against selling any copies of the subject of the engraving, is a trade libel upon the producer of a Berlin wool-work pattern of the subject, and if damage resulted, would be actionable. *Dicks v. Brooks*, English Ct. of Appeal, Nov. 5, 1880.

Lunatic—Capacity to make a Lease.—A lessor, at the time when he made a lease of a farm, labored under the delusion that it was impregnated with sulphur. On an issue, directed as to the capacity of the lessor to make the lease, rational letters by the lessor relating to the lease were put in evidence. The judge did not tell the jury that the letters did not displace the effect of the delusion, but directed them that it was a practical question whether the lessor was so insane as to be incompetent to dispose of his property, though believed to be full of sulphur. The jury found that the lease was valid. *Held*, no error. *Jenkins v. Morris*, L. R. 14 Ch. D. 674.

The case of *Debenham v. Mellor*, in which the wife's right to pledge her husband's credit for purchases made by her was discussed (3 Legal News, p. 258), has been taken to the House of Lords, where the judgment has been affirmed.

The Legal News.

VOL. IV. JANUARY 8, 1881. No. 2.

CLERICAL INFLUENCE IN ELECTIONS.

The judgment delivered by Mr. Justice Johnson, and concurred in by the two colleagues who sat with him in the Berthier election case, forms no inconsiderable contribution to the law of this country with reference to undue influence in elections. The learned Judge was required to deal with a case where Roman Catholic clergymen, actuated by a strong sense of duty, and possessing the courage of their convictions, warmly espoused the cause of one of the candidates in an election. They sought to influence the votes of their flock, not only by argument and counsel and exhortation, but also, unhappily, by letting it be plainly understood that they would refuse the sacraments of the Church to those who voted for the opposite side. The line is clearly laid down in the judgment between what may, and what may not, be done without producing civil consequences. A clergyman loses none of his rights as a citizen. He may hug the cause of one candidate or the other. He may, if he thinks proper, counsel his flock, privately or even from the pulpit, to vote as he would have them vote. But in taking this part in the election, and supporting the candidature of the man of his choice, he becomes an agent of such candidate within the meaning of the election law, (which is something quite distinct from an agent under the common law); and if he does or says anything which offends against the election law, the candidate cannot be relieved from the civil consequences, though the priest may be acting solely as he believes his religion commands him to act. In the present case the clergymen refused the sacraments to those who were going to vote for the obnoxious candidate. That was an act of intimidation and undue influence within the meaning of the election law, and as these clergymen had been openly working for the cause of the candidate whom they favored, and were therefore legally his agents, he could not escape the consequences of the act of intimidation. The privileges of the Roman

Catholic clergy in this country do not affect the decision of such cases at all; for, as the learned judge observed, "supposing any privilege from the operation of the election law to exist in such a case at all, it can only exist for the priest individually in the exercise of his sacred office; and he cannot give the benefit of it to a candidate, so as to shield him from the ordinary consequences of the acts of that candidate's agents; he cannot effectually assert his own individual privilege as the privilege of the candidate."

CHIEF JUSTICE MOSS.

Of the old firm of Harrison, Osler & Moss, of Toronto, two members became Chief Justices at a very early age. Mr. B. A. Harrison, when only 42, succeeded Sir William Richards as Chief Justice of Ontario, and Mr. Thomas Moss, at the earlier age of 41, was appointed, on the death of Chief Justice Draper, to the still higher office of Chief Justice of the Court of Appeal, in which Court he had already served two years as a Judge. We regret to add that the career of these two eminent men, alike in rapidity of advancement, is also alike in brevity of judicial service. A cable message was received in Toronto on the 5th instant, stating that Chief Justice Moss had succumbed to the malady which, a short time ago, forced him to visit the south of France in the hope of relief.

Chief Justice Moss was born at Cobourg, Ont., 20th August, 1836. He was educated at the Toronto Academy, Upper Canada College, and at Toronto University, at which he was Gold Medallist in Classics, Mathematics and Modern Languages. He was called to the Bar in 1861; elected a Bencher of the Law Society in 1871, and created a Q.C. in 1872. He represented West Toronto in the House of Commons, from December, 1873, to 8th October, 1875, when he was appointed a Justice of the Court of Error and Appeal. On the 30th November, 1877, he was promoted to be Chief Justice of the Court of Appeal of Ontario. His judgments during his brief judicial career have evinced an intimate knowledge of the law, and have generally been received with great respect. The number of appeals from the Court in which he presided has been small. The Chief Justice was also much beloved for his social qualities, and his premature removal from a position for

which he was admitted on all sides to be admirably qualified, has awakened feelings of no ordinary regret.

THE LATE MR. JUSTICE DUNKIN.

The Bench has sustained another loss, almost simultaneously, in the Province of Quebec. Mr. Justice Dunkin, of the Superior Court, who long took an active part in public affairs, died at his residence, Knowlton, P.Q., on the night of the 6th instant. Judge Dunkin was born in England in 1812. He was educated at the University of London, and at those of Glasgow and Harvard. He was appointed Secretary of the Education Commission under Lord Durham, and held other offices in the Civil Service. Subsequently he was admitted to the Bar in 1846, and was a member of the eminent firms of Meredith, Bethune & Dunkin, and Bethune & Dunkin. He represented Drummond and Arthabaska from the general election in 1857 to the general election in 1861, and subsequently Brome from January, 1862, until the Union, when he was returned to the Commons and the local House by acclamation. He was Treasurer of Quebec Province from July, 1867, until November, 1869, when he became Minister of Agriculture of the Dominion. In October, 1871, he was appointed a judge of the Superior Court, an office which he retained until his death. Mr. Dunkin was the author of the celebrated temperance measure known as the Dunkin Act. He was a sound lawyer, a good speaker, and a careful Judge.

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, Nov. 30, 1880.

MASSÉ et al., Petitioners, and ROBILLARD,
Respondent.

[Continued from p. 8.]

Clerical influence in Elections.

JOHNSON, J., continued:—

Let me now, before entering more particularly on any specific charge, refer to the law as settled by the highest authorities, as to what is, and what is not "undue influence." In the Longford case, Mr. Justice Fitzgerald, in his judgment, declared the election void on the ground of corrupt treating. As to undue influence on the part of the clergy, he said: "The

utmost care has been taken by the Legislature for the purpose of defining what undue influence is, and of repressing it. It is defined with a view to embrace almost every case of improper influence, whether by physical intimidation or otherwise; and if we were now applying to the Legislature to amend the law so as to include any case that might have been omitted, it would be difficult to invent language more comprehensive." And subsequently: "In considering what I call here undue clerical influence, it is not my intention to detract from the proper influence which a clergyman has, or, by a single word, to lessen its legitimate exercise. We cannot forget its wholesome operation, and how often, even recently, it has been the great bulwark of the community against insurrection and fruitless attempts at revolution. The Catholic Priest has, and he ought to have, great influence. His position, his sacred character, his superior education, and the identity of his interests with his flock insure it to him; and that influence receives tenfold force from the conviction of his people that it is generally exercised for their benefit. In the proper exercise of that influence on electors, the priest may counsel, advise, recommend, entreat and point out the true line of moral duty, and explain why one candidate should be preferred to another, and may, if he thinks fit, throw the whole weight of his character into the scale; but he may not appeal to the fears or terrors or superstition of those he addresses. He must not hold out hopes of reward here or hereafter, and he must not use threats of temporal injury, or of disadvantage or punishment hereafter. He must not, for instance, threaten to excommunicate, or to withhold the sacraments, or to expose the party to any other religious disability. If he does so with a view to influence a voter, or affect an election, the law considers him guilty of undue influence."

As to the influence of the clergy when not undue, alluding to a meeting of the clergy that had been relied on to some extent in that case, the same judge said:

"I allude to this meeting because it has been made the subject of much commentary, and upon the face of the petition, as well as in the evidence given for the Petitioners, it has been made the foundation of many of the charges which have been put forward. It is

not my duty to pronounce upon the policy or expediency of that step so taken by the clergy—that is the holding, in the first instance, a meeting confined to the clergy of the county, and their selecting a candidate whose interest they agreed to promote with all their power. All I have to do is to pronounce upon the legality of it, and I am obliged to say that however objectionable it may have been, it was a lawful proceeding. It was quite as open to the clergy, as electors of the county, as it would have been to any other body of electors in the county, to separate themselves from the general mass of the electors, select a candidate, and agree to support that candidate. When we recollect the very great interest which the clergy had in the then pending election, and the crisis which they no doubt considered was imminent, probably, it is a course which one would have expected they would take upon the occasion. The objections to it are that it separates the clergy from the laity; it exposes the former to the imputation of what is called ‘clerical dictation.’ It creates jealousy and uneasiness, and lays the foundation for the charge of undue influence; and there is this quite certain, that it calls upon the judge who may have to determine the validity of the election, to view with suspicion and criticise with vigilance the course which the clergy may take in the contest.”

In the County Tipperary case, Mr. Baron Hughes, in his judgment, declared the respondent duly elected. As to the influence of Roman Catholic priests, he said:—

“A priest’s true influence ought to be like a landlord’s true influence—springing from the same sources, mutual respect and regard, sympathy for troubles or losses, sound advice, generous assistance, and kind remonstrance—and where these exist, a priest can exercise his just influence without denunciation, and the landlord can use his just influence, without threat or violence. A priest is entitled, as well as any other subject, to have his political opinions, and to exercise his legitimate influence legitimately. It is a mistake to suppose that on a man taking holy orders he ceases to be a citizen, or ceases to be clothed with all the privileges and rights of a citizen. But a priest has no privilege to violate or abuse the law. He has no right to interfere with the rights and

privileges of other subjects. He may exercise his own privileges, but he must forbear in respect of others. It is also a mistake to suppose that every act of a priest is a spiritual one. An assault by a priest is simply an assault, and not priestly intimidation; and the assault of a priest can and ought to be resented, and prosecuted and punished like any other individual.”

In the Borough of Galway case, p. 200, Mr. Justice Lawson declared the election void on account of intimidation by the respondent and his agents. As to spiritual undue influence, he said:—“Undue influence, like other frauds of which it is only a species, must be established by evidence, and cannot be arrived at by conjecture. I need not refer to authorities to establish what, in point of law, constitutes undue spiritual influence. The judgments of Mr. Justice Keogh in the Galway cases, and that of Mr. Justice Fitzgerald in the Longford case leave nothing to be said as to the law of the matter.”

Having now referred, I hope not at too great length, to the settled law as to what is undue influence, and what is not, I may just refer again in a general way to these charges taken altogether as completely justifying the language I used in describing them, when I said that a very great part of them charge things which undoubtedly could not constitute “undue influence” in the sense of the law. It was undoubtedly the right not only of the rev. gentlemen here impugned, but of every elector in the county, and the law makes no distinction between the cloth, and the rest of the electors, to take any political side they chose: to denounce one party as the good one, and another as the bad one. It was their right to be earnest and vehement in the assertion of their opinions: to meet among themselves (as was done in the Longford case), and to agree as to what candidate they would support, and to support him by all the lawful means in their power. Up to the point at which we have arrived, I see nothing whatever to blame in the conduct of these gentlemen, and I know of no law even to prevent their alluding to the subject of a public election from their pulpits, if they see fit to do so. Mr. Lorange had a perfect right to send the letter, Mr. Robillard had a perfect right to carry it, and Mr. Champeau to receive and act on it; but we

now come to the question : How did he act on it? He was within the law in supporting his favorite candidate; but he could only do so by becoming his agent for that election, under the law, as it has been laid down. But the point is : What did he do as such agent? Did he do something that the law characterizes as "undue influence?" or did he merely act within the law? What he did can be stated in few words. It is distinctly proved by evidence that is unimpeached; and it was this : Maxime Hénault, of Berthier, aged 54, swears to it. I take it word for word, question and answer, from his deposition :—

Je ne suis point intéressé dans l'événement de ce procès.

Q.—Pendant l'élection dont il est question en cette cause, tenue en avril et en mai 1878, avez-vous eu occasion d'aller au presbytère de la paroisse de Berthier et de parler avec le Révd. Messire Champeau, curé de cette paroisse, de la politique ou de cette élection en rapport avec la religion, et racontez-nous ce qui s'est passé entre vous et lui à ce sujet?

R.—Je suis allé au presbytère demander à M. le curé pour pouvoir m'approcher des sacrements, faire mes Pâques.

Q.—Qu'est-ce qu'il vous a demandé, d'abord, en vous disant bonjour?

R.—Je suis entré; j'ai dit : bonjour monsieur le curé, il dit : bonjour M. Hénault. Il m'a demandé : Comment vont les rouges? J'ai dit : "ils vont assez bien, dans ce temps-ici, mais ils ont des difficultés pour faire leurs Pâques, et je voudrais bien faire mes Pâques comme je les ai toujours faites depuis ma première communion." Il me dit là, dans cette occasion-là : pour quel parti avez-vous voté? J'ai dit : j'ai toujours voté pour monsieur Sylvestre. Il m'a dit : voilà une élection qui se présente, voterez-vous dans le même sens? J'ai dit : oui. Il m'a dit : "eh bien ! pas de Pâques." J'ai dit : c'est bien ! je vous ai demandé à faire mes Pâques, j'irai plutôt à confesse ailleurs et je ferai mes Pâques.

Here, then, we have one case presented, about which, if the law I have cited is to prevail, there ought to be no difficulty whatever. I do not now say that that law, as I have cited it, is to prevail, because before I can say so properly, I must consider what is said on the other side, and which is of very great interest and importance indeed. I do not say that considered as a legal proposition those pretensions present any great difficulty; but I do say that we have felt a very deep interest, notwithstanding previous well-known decisions, in hearing those pretensions discussed as ably as they have been discussed by the learned counsel on both sides. The answer that is made, is not now made for

the first time. It is expressed to a great extent by the words "clerical immunity," and it maintains that the acts of the clergy are cognizable only by their ecclesiastical superiors. The privileges of the Roman Catholic clergy and religion, it is said, were guaranteed by the capitulation and the treaty, and therefore this freedom to exercise their religion is above the provisions of the election law, which is the law of the Parliament of this country, and which says that certain things on certain occasions are corrupt and illegal practices, and may have the effect of avoiding an election. I may say at once that we should not be averse to discussing once more a question that has been already pretty well discussed, and as far as the facts of the present case would go, completely decided; but in whatever way that question might be looked at, I say without hesitation that it is no answer at all to the present charge. Either these acts, or rather this specific act which we are now upon in the instance of Mr. Champeau, was committed, as it is alleged to have been committed, or it was not. It is alleged to have been committed by an agent of a candidate at an election. That is either true, or it is not. If it is not true; if there is no agency, then, of course, there is an end of the case at once; but if there is in this instance proved agency (and we hold that there is), the act that would appear to be proved would not be the act of a priest, *quâ* priest, but the act of an election agent who happened to be a priest. It is the act of the candidate done through the agency of another that is made the ground for asking that this election be set aside; and if the agent can shield the candidate by saying that besides his agency for him he had other and distinct privileges of his own, besides the rights of the candidate, then obviously there would be an end of all freedom of election whatever; for the candidate would in such a case only have to select clerical agents, and there would be an end of the matter. It is not for the acts of those who were acting independently of the candidate, but for the acts of those who are held by the law to have been his agents, that it is asked to set aside this election. Whether there be agency or not, then, this asserted privilege extraneous to the agency is quite immaterial, for if it exists extraneously to the agency, it cannot reach back to the candidate whose

acts are in reality now in question on the principle *qui facit per alium facit per se*. What the priest may do when acting entirely on his own behalf, and not as agent of a candidate in an election, is not now the question before the Court; but supposing any privilege from the operation of the election law to exist in such a case at all, it can only exist for the priest individually in the exercise of his sacred office, and he cannot give the benefit of it to a candidate so as to shield him from the ordinary consequences of the acts of that candidate's agents. He cannot effectually assert his own individual privilege as the privilege of the candidate. Therefore, I should feel disposed to regard this question as quite immaterial, on the plainest logical grounds; but if I did not so regard it, I should still be of opinion that it is founded on an entire misapprehension of the facts of history, and an entire disregard of the authority of law as founded on the most explicit decisions. This is a question of law, and purely of law, apart from all other considerations. Speculatively or philosophically, there might perhaps be difficulty in saying that of two co-existing but different obligations—the one of religious, and the other merely of legal force—the latter were to be preferred. As a question of law in a Court of Justice, however, there can be no question about it. The privileges of clergymen, of whatever denomination they may be, are subordinated to the law of the land; allowing their freedom to any extent that they may be pleased to assert it, the question is not whether they have it, but what effect under a certain Statute the exercise of it is to have on an election. What is the limit, in all cases or in any case, of human law I decline to discuss. Its limit for us is the limit of its plain expression. We are its sworn officers: what it says plainly we must say that it says. I called upon the learned counsel for the defendant to say, as it is my habit to do, all that could be said on this subject, *i.e.*, the perfect freedom of the Roman Catholic clergyman to profess and to practice his religion, and I heard with very great pleasure all that could be said on the subject by one of the ablest men in the profession; and I did so because I am persuaded such a habit is good and conducive to justice, as tending to extract all that can be said, and best said, by those most qualified to put it forcibly;

and I did so, also, because this particular subject had made a deep impression on my mind, and I did not wish to dispose of it without, as it were, holding it in my hand, and looking at it on all sides, and finding out what stuff it is made of; and I find out at last, that it is made of very good stuff indeed in itself, and for its own purposes; but very flimsy stuff indeed when applied to influence, or to carry elections, and to make them proper, free and valid proceedings under the human law that I administer. I do not deny, and indeed I put such a case to the respondent's counsel, that there may be instances in which, apart from the strict lines of law and logic within which this Court should act, it would be difficult to say that either priest or layman was using "undue influence," at least in an ordinary sense, merely because he should do some of the things which have been held, by the decisions in election cases, to constitute that offence. Take the case I put to the learned counsel—the extreme and improbable case if you will—of a candidate pledged to bring in a bill to repeal the laws against theft or murder founded on the decalogue. It would surely not be thought by ordinary men that there was any "undue influence" in saying of such a candidate and his supporters, that both alike were risking their salvation. Yet, when it came to be looked at in the light of the statute, it might possibly be seen that it was legally "undue influence," because voting is an exercise of a political right protected by the Statute, and considered simply as a political right to be protected in his person, the voter has the power to vote as he pleases. The agent, therefore, might be quite right in his opinion, and quite wrong in asserting it at such a time and for such a purpose, because the law has said that at such a time the elector is to be left free to exercise his choice, and that there is a species of influence which it calls undue, and which does not appeal to the reason and judgment only, but to the most tremendous subjects of which the human mind is capable of receiving impressions. I agree, then, with the defendant's counsel in every word that has been said as to the granting of this religious liberty; but I do not agree as to the effect of the grant. Those to whom it was granted were not put above the law, nor above the rest of their fellow-countrymen. It was a great and a

just act of State placing those who received the benefit on the same footing with respect to their religion as the other inhabitants of the country might occupy with respect to their's. But religious freedom and equality are one thing; to establish the superiority of one order over another—an *imperium in imperio*—would have been quite another. And after the series of cases on this subject, which it would now be mere pedantry to parade, with every desire and readiness to hear whatever could be said on either side, we might well have declined to reconsider the question whether the authority of the Sovereign of England can be exerted in her Courts over all her subjects in this country, without distinction, or whether there are some of them who can violate the Statute law of the land, and at the same time decline the jurisdiction of the ordinary tribunals.

Called upon, then, to determine this election petition, we decide the case on this one single act—the first one we take up—of one of the gentlemen impugned, the Rev. Mr. Champeau. It is sufficient to determine the case as far as the validity of the election is concerned; and our duty calls upon us to go no further than that one case for that purpose. I have said it is sufficient. Under the decisions in the English cases cited, the matter is beyond doubt; under the decisions here in our own country, the case has been declared with equal plainness on the point as to whether the act in question constitutes an undue influence. The cases were cited at the bar; they are well known, and of course are binding on us as precedents. There is only one which was not, I think, cited—at all events that part of it which I will now refer to. It is the Charlevoix case, in which the well-known and extremely able judgment of Mr. Justice Routhier was rendered. That learned judge held that he had no jurisdiction—a point on which the Supreme Court held a different opinion; but as to undue influence and what will constitute it, the learned judge held precisely what we are now holding, and his language is so clear that I will permit myself to cite it: "En effet," says the learned judge (p. 369 of the report), "pour qu'il y ait intimidation, il faut que celui qui commet cette offense prive, ou menace de priver l'électeur d'un bien dont il dispose. Or les sacrements sont des biens spirituels dont le prêtre dispose

"suivant certaines règles que l'église lui a tracées. Quand le prêtre refuse les sacrements à un électeur à cause de son vote, je comprends donc qu'un juge qui se croit compétent en matière spirituelle puisse dire qu'il y a intimidation." The learned judge's doubt was about the power of the lay tribunal, not about the legal character of the act which is proved in this case. Since the judgment of the Supreme Court in that same case, we do not feel the difficulty which Mr. Justice Routhier felt about the jurisdiction, and we have no misgiving as to the law and the reason of his description of the act. Now, as regards the other cases, though we are not called upon to pronounce upon them as regards the validity of the election, we have been obliged to look at them (and a very heavy labour it has been), with a view to satisfy ourselves not only of their real character in themselves, but also of the personal complicity of the respondent. We might, of course, proceed to apply these principles to the other cases, and to consider the evidence appropriate to each of them; but we purposely abstain from doing so. Though we have been obliged to examine and consider all these charges, and all the evidence, we think we are not called upon to discuss them at length. We merely say that, with the exception of the Rev. Mr. Loranger, we consider undue influence and intimidation to be clearly proved in all the cases; and, of course, for the purpose of applying the law to this case, one single case is as good as a thousand. In declining, then, to go further into these charges as unnecessary for the determination of the case before us, we will merely say that in none of them, including the charge already disposed of, do we see any sufficient or convincing evidence of the respondent's personal complicity with any of those acts. For the same reasons, it becomes quite unnecessary to consider the motion to reject evidence. The case is disposed of without reference to the evidence that was objected to by the respondent; therefore, the petitioners have no interest in having the evidence allowed, nor the respondent in getting it rejected. It only remains to say that we avoid the election on the ground of undue influence and intimidation practised by agents.

Election annulled.

Germain & Co., for petitioners.
M. Mathieu for respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, Dec. 21, 1880.

SIR A. A. DORION, C.J., MONK, RAMSAY, CROSS,
BABY, J.J.KANE (plff. below), Appellant, and WRIGHT
et al. (defts. below), Respondents.*Contract—Partnership interest.*

The appeal was from the judgment of the Superior Court, Montreal, Johnson, J., Sept. 30, 1878, dismissing the appellant's action. See 1 Legal News, p. 482, for the judgment of the Superior Court.

RAMSAY, J. I hope this case is a peculiar one. It is certainly interesting in a sense, for it has all the machinery of a sensational novel—plot and counterplot. The Harbor Commissioners of Quebec, having extensive works to do, advertised for tenders. With official precision, the full details were set forth in the advertisement; the day and very hour in which the sealed tenders should be sent in were specified. Nothing could look more fair and above board, but at the very moment that all this was going on, it was perfectly known in certain circles in Quebec that Mr. Peters was to get the work. Among those who were aware of this were the respondents in this case, and in the afternoon of the day on which the tenders were lodged, that is on the first of February, 1877, they divulged to Mr. Peters the rate they had charged for dredging. This, of course, is denied, but there is no escape from the conclusion as to what must have taken place by the result. First, it is admitted that prices were given. Secondly, immediately afterwards the Harbor Commissioners asked for supplementary tenders. Peters tendered anew; Moore, Wright & Co. tendered anew; and the contract which was really executed was in favor of Peters, Moore and Wright. We are now asked to believe that there was no connivance between the Harbor Commission and Peters; that Moore & Wright, not being able to obtain the whole contract for Moore, Wright & Co., were perfectly entitled to take a sub-contract from Peters, and that that was all they had done, and that the contract had really been accorded to Peters, and that their names had been inserted afterward, when the formal document

had been drawn up, as a matter of convenience, and that, in effect, they had only to do with a portion of the contract.

If this extraordinary and improbable story were true, it seems to me that it would not mend the matter, so far as the respondents are concerned. They evidently were the agents in this transaction of their co-partners, and they couldn't make a contract as to any portion of these works behind their partners' backs, and therefore they are obliged to render an account of their gains on this contract for one share to the appellant.

They might have been coerced to this by one action to account after the whole work was done, or by periodical actions during the progress of the work. The appellant has taken the least advantageous course for himself, probably because he did not wish to be involved in tedious litigation, and so he has rendered the proof of his case rather difficult. The Court has assessed his damages at \$2,500. In this judgment I concur, as I think there is some evidence to show that the appellant's share of the gain would have been at least as great as this. I may add, on the question of Moore & Wright's liability, that during the whole period of the negotiations with Peters they were entertaining Kane & Macdonald with the idea that they were acting for them. When the new tenders were called for, they called it a fraud, said it was "too thin to wash," and that they would "warm" some one, probably "that engineer" at Quebec. In reality, they had provided a warm place for themselves, by getting two thirds of the contract with Peters, instead of one-half with Kane & Macdonald. After the bargain with Peters was complete, they went through the farce of tendering Kane & Macdonald a share in their contract; and when they wrote to accept, they answered they had made other arrangements. What these other arrangements were has never been disclosed, and it is not of much matter to anybody what they say on the subject. Their conduct shows the grossest bad faith, and I only regret there is not sufficient evidence to enable the Court to make them pay more sharply than they will have to do under this judgment.

The judgment is as follows:—

"Considering that it is proved that the appellant, the respondents, and Angus P. McDon-

ald mentioned in the plaintiff's declaration, associated themselves together at Montreal in January, 1877, for the purpose of tendering for the execution of certain public works at the mouth of the St. Charles River, in the Harbor of Quebec; that they did so tender for said work, and also made a supplementary tender for the same work, and it was contemplated by them, understood and agreed that they should be jointly interested not only in the profits of the entire work, but in such portion of it as could be secured, either directly or by sub-contract;

"And considering that the respondents afterwards, in violation of their obligations and in fraud of the rights of the appellant, procured the contract for the execution of a large proportion of said works, in conjunction with one Simon Peters, of the City of Quebec, contractor, in the profits of which the appellant has a right to participate as regards the respondents;

"And considering that the respondents, after they had secured, in conjunction with the said Peters, the contract for the construction of a large proportion of said works, offered the appellant and the said Angus P. McDonald a share in said contract, which they agreed to accept, but the respondents afterwards refused to fulfil their said offer;

"And considering that it is proved that said contract so secured by respondents was of great value, and that the appellant is entitled to one-fourth of the profits of said contract, which respondents have refused to allow him;

"And considering that the appellant by reason of the premises has suffered damage to the amount of \$2,500;

"And considering that there is error in the judgment rendered by the Superior Court on the 30th day of September, 1878;

"This Court doth reverse and cancel the said judgment of the 30th September, 1878, and proceeding to render the judgment which the said Superior Court should have rendered, doth condemn the respondents to pay to the appellant the said sum of \$2,500 as and for his damages in the premises, with interest from this date, and the costs as well those incurred in the court below as on the present appeal."

Judgment reversed.

Girouard & Co. for appellant.

Bethune & Bethune for respondent.

RECENT U. S. DECISIONS.

Common Carrier—Rights of Express Companies on Railroads.—A railroad company cannot, directly or indirectly, trammel or destroy express enterprises by excluding express companies from its lines, or fettering them with unjust regulations or unfair discriminations. Nor can it assume to itself the exclusive right of carrying on the express business over its own lines.—*Southern Express Co. v. Louisville & Nashville R.R. Co.*, Tennessee, Western District, Nov., 1880.

Crim. Con.—Damages.—Damages for criminal conversation with plaintiff's wife may be mitigated by proof of her consent. Whether she yielded only to importunity or threw herself in the way of her paramour is material.—*Ferguson v. Smethers*, Supreme Court, Indiana, Nov. 24, 1880.

GENERAL NOTES.

Mr. Justice Strong, at the age of 72, has retired from the bench of the Supreme Court of the United States. Judge Strong first served ten years as Chief Justice of Pennsylvania, and subsequently ten years in the U.S. Supreme Court. He is now entitled to his salary of \$10,000 per annum for life.

The *London Law Journal* says: "The other day a learned gentleman of somewhat persistent eloquence, who was employed in an appeal against a decision of Vice-Chancellor Malins, informed the Court of Appeal that in the argument below the Vice-Chancellor 'stopped' him. 'Indeed!' said the Master of the Rolls; 'how did the Vice-Chancellor ever manage that?'"

The *Central Law Journal*, referring to the rights of check-holders and payees of unaccepted drafts, says: "The courts of the United States, England, Massachusetts, Pennsylvania, Louisiana, and New York maintain that the holder of neither of these instruments can sue the drawee before acceptance, while the courts of South Carolina, Illinois, Iowa, Kentucky, and Missouri hold that check-holders can maintain such suit against the bank or banker, whether the amount of the check is the whole or a part of the sum on deposit in favor of the drawer."

William Wait, a law writer of note, died of consumption at his residence in Johnstown, N.Y., Dec. 29. Mr. Wait is the author of several works of importance, including "Wait's Law and Practice," a "Digest of the New York Reports," "Supreme Court Practice," and lastly, "Actions and Defences," in seven volumes, a work which, it is said, has had an immense sale in every State in the Union. In the preparation of these voluminous works, the author overtasked his powers and contracted the disease which has cut short his days. He leaves a fortune of \$100,000 derived from the sale of his books.

The Legal News.

VOL. IV. JANUARY 15, 1881. No. 3.

DISCHARGE OF JURY ON TRIAL FOR FELONY.

One result of the establishment of the *Legal News* has been that the decisions of our Quebec Courts, instead of never being heard of outside of the Province, as formerly, are now widely copied and circulated by our exchanges in the United States and Ontario, and the rulings on questions of general interest and importance are thus becoming well known to the profession at large. We take this in itself to be no inconsiderable advantage, for our Judges have thus the hope of more than local fame to animate them, and the criticism which may occasionally follow cannot have other than a wholesome influence. Among the numerous cases which have thus been rendered accessible to the legal world is *Jones v. Reg.*, 3 *Legal News*, 309, with reference to the discharge of juries before verdict. The *Criminal Law Magazine*, in reproducing this report, appends an interesting note, a portion of which we extract:—

"The allusion of Mr. Justice Ramsay, in his opinion in this case, to that portion of the fifth amendment to the constitution of the United States, which has been incorporated into nearly all of the state constitutions, and which declares, 'nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb,' suggests an inquiry as to the construction given to that expression of the constitution by the American courts. The cases in which this subject has been discussed, extracts from some of which are given below, show a decided conflict of opinion as to the proper interpretation of the phrase 'twice in jeopardy.' Many of the authorities, and particularly the United States courts, hold that it cannot be considered to mean more than the common law plea of *autrefois acquit*, and that it was placed in the constitution for the purpose of making more emphatic the right of the citizen to be secure from a second trial for the same offence; while others contend that unless it was the intention to go further than the common law

maxim, the constitutional expression would be useless.

"The case of *People v. Goodwin*, 18 Johns. (N.Y.) 187, decided in 1820, was upon an indictment for manslaughter, where the jury had been discharged because they were unable to agree. Spencer, C.J., who delivered the opinion of the Court, says: 'What is the meaning of the rule that no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb? Upon the fullest consideration which I have been able to bestow on the subject, I am satisfied that it means no more than this: that no man shall be twice tried for the same offence.' . . . After discussing the question whether the discharge of the jury amounted to an acquittal, and holding that it did not, and that the power to discharge existed in cases of extreme necessity, whether upon a trial for felony or for misdemeanor, and that such a case of necessity arose where the jury might be presumed as never likely to agree, the Chief Justice continues: 'Much stress has been placed on the fact that the defendant was in jeopardy during the time the jury were deliberating. It is true that his situation was critical, and there was, as regards him, danger that the jury might agree on a verdict of guilty; but, in a legal sense, he was not in jeopardy, so that it would exonerate him from another trial. He was not tried for the offence imputed to him. To render the trial complete and perfect, there should have been a verdict, either for or against him. A literal observance of the constitutional provision would extend to and embrace those cases where, by the visitation of God, one of the jurors should either die, or become utterly unable to proceed in the trial.'

"This view of the effect of the constitutional provision is generally concurred in by the United States Courts. In 1823, the question arose in the case of *United States v. Haskell*, 4 Wash. C.C. 402. The jury in that case were discharged after having been kept together three days, there being no prospect of their agreeing, and the Court being satisfied of the insanity of one of the jurymen. The indictment was for a capital offence. Washington, J., says: 'But it is contended that although the Court may discharge in cases of misdemeanor, they have no such authority in

capital cases; and the fifth amendment to the constitution of the United States is relied upon as justifying the distinction. We think otherwise, because we are clearly of opinion that the jeopardy spoken of in this article can be interpreted to mean nothing short of the acquittal or conviction of the prisoner, and the judgment of the Court thereupon. This was the meaning affixed to the expression by the common law, notwithstanding some loose expressions to be found in some elementary treatises, or in the opinions of some judges, which would seem to intimate a different opinion.'

"In *United States v. Perez*, 9 Wheat. 589, the jury, being unable to agree, were discharged by the Court from giving any verdict upon an indictment for a capital offence, without the consent of the prisoner, or of the attorney for the United States. Mr. Justice Story, who delivered the opinion of the Court, held that the facts were no bar to a future trial; that the law gave to Courts the power to discharge a jury from giving a verdict whenever the act was manifestly necessary, or the ends of public justice would otherwise be defeated."

COUNSEL FEES.

In the case of *Doutre v. The Queen*, a claim against the Dominion Government for professional services rendered as counsel before the Fisheries Commission, (referred to in 3 *Legal News*, p. 297), judgment was rendered by Mr. Justice Fournier, in the Exchequer Court, on the 12th inst. The Court fixes the remuneration of Mr. Doutre at \$50 per day for fees, and \$20 per day for expenses, making \$70 per day for the 240 days over which the engagement extended. This estimate, which is somewhat less than the sum Mr. Doutre demanded, will probably be held not extravagant. The *Albany Law Journal*, in reference to the figures mentioned in the *Legal News* (vol. 3, p. 297), remarked:—"These amounts seem large, no doubt, but they are by no means unprecedented in this country. There are a number of counsel in the city of New York who command \$250 a day."

THE MARRIAGE BILL.

The following appears in *La Minerve* of Wednesday last:—

"Une décision du Saint-Siège, en date du 7 novem-

bre et dont il sera bientôt donné communication au public par l'épiscopat, condamne le bill relatif aux mariages de beaux-frères et belles-sœurs, présenté par M. Girouard à la dernière session. Nous croyons qu'en face de cette condamnation, M. Girouard, dont les intentions, du reste, n'ont jamais été mises en doute par les autorités religieuses, a décidé de ne plus présenter ce bill."

The bill was so favorably received last Session, and has been so warmly supported in various quarters, that it is not improbable that it will be adopted by some other member, and be again pressed upon the attention of Parliament.

BAR EXAMINATIONS.

The half-yearly examinations, which were held at Montreal during the past week, ended on Wednesday with the following result:—

Admitted to Practice:—Henry B. Hammond, Pierre R. Goyette, Chas. Lemoyne de Martigny, André Cherrier, Albert Wm. Atwater, Joseph P. Cooke, Eugène Lafleur, Alfred de Beaumont, G. A. Hughes, Wm. Prescott Sharp.

Admitted to Study:—Wilfred Mercier, Joseph L. Gouin, René Daigle, Godfrey Coffin, Charles de Bellefeuille Macdonald, Charles Gratton, Henri Le-tondal, Alfred Bachand, Mathias Tellier, Edouard Bauset, Olaus Thierien, Horace A. Hutchins, Wilfred Edmond Lassier, Arthur McConnell.

NOTES OF EXCHANGES.

THE SOUTHERN LAW REVIEW—St. Louis.—The December-January number of this Review comes with an unusually interesting budget of articles. "Power of Municipal Corporations to Borrow Money," "Expert Evidence," and "Modern Legislation touching Marital Rights," are among the subjects discussed.

THE AMERICAN LAW REVIEW—Boston.—The last two numbers contain an article by Mr. J. B. Thayer, treating very fully *Bedingsfield's* case, and the subject of declarations as part of the *res gesta* (the author prefers the singular).

THE CRIMINAL LAW MAGAZINE—Jersey City.—This new bi-monthly has completed its first year, and has well sustained throughout the reputation which the opening number secured. A leading article on "Conflict of Criminal Laws," from the pen of Francis Wharton, LL.D., appeared in the November issue.

THE CANADIAN LAW TIMES—Toronto.—This is a new monthly publication, established by

Carswell & Co., "to endeavor to meet the views " of a large number of the Ontario Bar outside " of Toronto," and the publishers hope that it " may serve as a medium of communication between the centre of administration and the " outer counties, as well as between the outer " counties themselves." The first number has the general features of a Review, containing two contributed articles, with a digest of recent criminal cases, and other matter. The editors are perhaps over-sanguine in looking "to the " profession at large for their leading articles," for the number of competent writers who can afford the time for such labor is not large in the Canadian profession, and several attempts to establish a Review, that promised well, have not been sustained in consequence. The first number, however, opens auspiciously with a valuable article on the Law of Allegiance in Canada, by Mr. T. Hodgins, Q.C., followed by a second, also interesting, by Mr. A. H. Marsh, entitled "Does a Power to Sell imply a Power to Mortgage?" The *Law Times* is also to contain notes of the current decisions of the Ontario Courts, the first part of which has just been issued. We must add that the typography and general appearance of the number are creditable to the publishers, and we trust the enterprise may have the success it merits.

THE CANADA LAW JOURNAL—Toronto.—A new series of the *Law Journal* has been commenced this month, and, perhaps inspired by the advent of its new competitor the *Times*, it is to appear fortnightly instead of monthly. The changes effected in our Ontario contemporary are a vast improvement, and it evidently means to hold its ground.

VICK'S ILLUSTRATED MONTHLY MAGAZINE, Rochester, N.Y.—One of the most charming and healthful recreations in which a tired lawyer can indulge is the culture of plants, and no more entertaining companion in the pursuit can be found than Mr. Vick's beautiful little magazine. Its cheerful and enlivening articles will speedily awaken enthusiasm in the coldest student of the flowery world. The numerous and elegant illustrations show very forcibly the strides which botanical science has been taking in recent years.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, NOV. 19, 1880.

SIR A. A. DORION, C. J., MONK, RAMSAY, CROSS, BARN, JJ.

LA BANQUE VILLE MARIE (plff. below), Appellant, and PRIMEAU (deft. below), Respondent.

Promissory Note—Alteration after endorsement.

Held, where a promissory note bore on its face a manifest alteration of date, that the holder, who had discounted the note for the maker, could not recover from the endorser, without showing either that the alteration was made before the endorsement, or, that it was made with the endorser's consent.

The question was as to a note for \$200, made by one Charland, endorsed by the respondent, and discounted by the appellant for Charland.

The respondent pleaded, as to this note, that when he endorsed it (for Charland's accommodation), it was dated March 5, 1877, and that the date had subsequently been altered to April 9, 1877, without his knowledge or consent.

The action was dismissed (so far as this note was concerned) by the Superior Court, district of Richelieu, Loranger, J., Dec. 16, 1878. The judgment was as follows:—

"La cour.....

"Considérant qu'il est en preuve que depuis l'endossement du défendeur, apposé sur le billet promissoire en second lieu allégué par la demanderesse, et en vertu duquel elle réclame du dit défendeur la somme de \$200, montant du dit billet, \$2.56 coût du protêt d'icelui, intérêt échu sur le dit montant, ce billet a été altéré; que quand il a été endossé, il était daté du cinq mars, 1877; qu'il a été altéré en substituant à cette date celle du 9 avril, 1877, et ce, sans la connaissance et le consentement du dit défendeur; a débouté et déboute la demanderesse du surplus de la demande, avec dépens, &c."

RAMSAY, J. I think this judgment is correct. The pretention of the appellant seems to be that the presumption of law is that the endorsement of a promissory note is made after the signature of the drawer, and that it being proved that the signature of the drawer was affixed after a manifest alteration of the date, the presumption still subsists, and in the absence of

any evidence binds the endorser to a third party in good faith. I readily admit that the endorsement is presumed, in absence of evidence, to follow and not precede the signature of the endorser. This presumption would be complete in the present case if the endorser had obtained the discount, but it is very slight where the endorsement is for credit as in this case. (See evidence of Paquin, p. 11 appellant's factum, line 21.) I think that there being a visible alteration on the face of the bill, it was for the appellant, before taking it from the drawer, to enquire how this apparent alteration occurred, and whether with the consent of the endorser or not. By not doing so the Bank is open to the reproach of negligence, and therefore the Bank cannot claim any exceptional favor on the ground of good faith. The appellant, therefore, was under the necessity of showing, when challenged, that the bill, visibly altered, and the alteration in no way authenticated, had been altered either before the signature of the party not producing it or with his consent. The appellant has not done so. Taylor on Ev., Nos. 1616, 1624, 1626. I should attach little or no importance to Charland's testimony uncorroborated, for he joined in the fraud of altering the bill after signature, if it was contradicted. But it is not and I don't think it was necessary.

Judgment confirmed.

Trudel, DeMontigny & Charbonneau, for Appellant.

Adolphe Germain, Counsel.

L. A. McConville and Loranger & Co. for Respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, NOV. 24, 1880.

SIR A. A. DORION, C. J., MONK, RAMSAY, CROSS, BABY, JJ.

MARTIN (plff. below), Appellant, and POULIN (deflt. below), Respondent.

Composition—*Secret payment of amount in excess of composition rate*—*Endorser*.

Held, that the endorser of composition notes is not discharged from liability thereon by the mere fact that the compounding creditors have secretly stipulated with the debtor that he shall pay them an amount in excess of the composition rate, as the condition of their consent to the composition; and especially where the endorser, as the

consideration of his endorsement, obtained a transfer of the insolvent's entire stock-in-trade and assets which he still retained when sued on the composition notes. But the endorser is entitled to a deduction of all sums that the creditor has received in excess of the composition notes.

The appeal was from a judgment of the Superior Court, Montreal, Papineau, J., Dec. 19, 1877, dismissing the appellant's action.

The appellant sued on two promissory notes amounting to \$2,418.68, secured by obligation and hypothec of date, April 27, 1876.

The plea set up that the notes were signed by the defendant (respondent) under a deed of April 27, 1876, which deed was executed to secure to plaintiff payment of two composition notes of one Massé, endorsed by defendant, also, of a note for \$500 signed by Massé and endorsed by defendant; and, lastly, of a note for \$100 signed by Massé alone. The circumstances under which these notes were made were alleged to be as follows:—

In May, 1875, Massé was in business at Richelieu, in the district of St. Hyacinthe. Being then insolvent, he asked appellant, a creditor, to aid him in obtaining his creditors' consent to a composition. The appellant consented, on condition that Massé would give him a mortgage for \$5,374.11, pay him a bonus of \$600, and hand over to him a lot of hats and a sewing machine, valued at \$250. On these terms, the appellant agreed to sign an agreement of composition at 50 cents in the dollar, and to help him to obtain the signature and consent of his other creditors. Massé accepted the terms and gave a mortgage accordingly, bearing date, May 20, 1875. The other creditors accepted the composition, but Massé was obliged to promise some of them a bonus and to give them his personal notes for the remaining 50 cents in order to obtain their signatures. The composition agreement, of date July 27, 1875, was in these terms:—

" Nous soussignés, créanciers de H. E. Massé, marchand du village de Richelien, acceptons 50 centins dans la piastre pour le montant de nos dettes respectives, payables en paiements égaux, à 4, 8 et 12 mois, avec endosseur à notre approbation, et lui donnons en conséquence une décharge générale et finale pour la balance."

The appellant signed for the amount of his obligation, \$5,377.11, "Sans préjudice à une

hypothèque que nous ténons." Massé then applied to the respondent, a friend of his, to obtain his endorsement of the composition notes. The latter agreed to endorse, if Massé would give him a mortgage to cover his endorsement, and also transfer his stock-in-trade and assets to him. This Massé did by deed of Aug. 11, 1875, and on the same day the appellant transferred to the respondent his obligation of May 20, 1875, which had never been registered and which was worthless, as Massé's property was already hypothecated to its full value. At the same time the appellant and Massé, having led the respondent to believe that the appellant had made advances of goods to Massé, induced the respondent to endorse a new note for \$500, and Massé also gave the appellant his own note for \$100.

In 1876, Massé having become an insolvent under the Insolvent Act of 1875, the appellant claimed the entire amount of his debt, without reducing it as per composition of July 27, 1875, and based his claim on the old notes which he had retained in his possession. Massé, before his insolvency, had paid the first of the composition notes, but when payment of the second notes was demanded, the respondent, who was ignorant that notes had been given by Massé in excess of the composition, asked for delay, and in consideration of obtaining such delay gave an obligation and mortgage bearing date April 27, 1876, to secure the last two composition notes, as well as the note of \$500 and that of \$100.

The respondent's pretention was that the composition agreement of July 27, 1875, was simulated and fraudulent, and therefore the obligation of April 27, 1876, was made in error, and was null and void.

The appellant denied the charge of fraud, and declared that he had accepted the composition without prejudice to the collateral security which he held, consisting of a mortgage and other securities.

The judgment of the Court below was as follows:

"La Cour, etc...

"Considérant que le défendeur a prouvé les principaux allégués de son plaidoyer, et spécialement, qu'il est prouvé que le 20 mai 1875, le demandeur s'est rendu au village de Richelieu chez le nommé H. E. Massé, marchand, alors retenu depuis cinq mois à sa maison par maladie;

"Considérant qu'il est prouvé que le demandeur avait alors raison de croire que le dit H. E. Massé était incapable de faire honneur à ses engagements, vu qu'il avait depuis quelque temps, cessé de les rencontrer envers le demandeur, et que ce dernier savait que d'autres créanciers du dit Massé se plaignaient de lui sous ce rapport;

"Considérant que le dit jour, 20 mai 1875, le demandeur s'est fait consentir une obligation par le dit Massé pour la somme de \$5,377.11 devant Mtre. D.D. Bessette, notaire, la dite somme étant pour les diverses sommes d'argent tant échues que non-échues, alors dues par le dit H. E. Massé au demandeur;

"Considérant qu'il a été entendu entre le dit Massé et le dit demandeur, que ce dernier aiderait le dit Massé, à raison de cette obligation, dans le cas où le dit Massé faillirait ou ferait une composition;

"Considérant qu'il a été prouvé qu'il a été question entre le dit Massé et le dit demandeur, de laisser écouler une période de trente jours, après la date de cette obligation, afin de la rendre valable;

"Considérant que, lors de la passation de la dite obligation, le dit Massé s'est engagé à envoyer au demandeur, en sus de la créance de ce dernier, quelques centaines de douzaines de chapeaux et un moulin à coudre, qui n'avaient pas été achetés du demandeur, et que de fait il les a envoyés au dit demandeur quelque temps après;

"Considérant qu'à la connaissance et suggestion du dit demandeur, suivant le témoignage du dit Massé corroboré par le témoin Turgeon, commis du demandeur, et par les aveux de ce dernier, les dits chapeaux et moulin à coudre ont été envoyés au demandeur et reçus par lui d'une manière détournée, et par l'entremise d'un nommé Chaput qui n'avait rien à faire avec le magasin du demandeur;

"Considérant que, en effet, peu de temps après la dite période de trente jours écoulée depuis la date de la dite obligation du 20 mai 1875, savoir, entre le commencement et le 27 du mois de juillet de la même année, le dit H. E. Massé, aidé du demandeur, est entré en négociation avec ses créanciers pour en obtenir une décharge, et qu'il en a, de fait, obtenu un acte de composition et décharge, à raison de dix chelins dans le louis;

“ Considérant que le ou vers le 27 de juillet 1875, le demandeur a, de fait, signé le dit acte de composition à raison de dix chelins dans le louis sur tout le montant de sa créance, sans en avoir déduit la valeur des dits chapeaux et moulin à coudre qu'il avait alors reçus, au lieu et place d'argent que le dit Massé lui avait promis, mais ne lui avait pas donné ;

“ Considérant qu'il est prouvé que le dit demandeur a obtenu du dit Massé la promesse d'une somme de \$600, en sus des billets que ce dernier devait donner au demandeur pour rencontrer le montant de sa composition à dix chelins dans le louis comme susdit ;

“ Considérant qu'il est prouvé que le demandeur et le dit Massé ont trompé le défendeur pour lui faire endosser un billet du dit Massé en faveur du demandeur pour \$500 sur cette somme de \$600, et que le dit Massé a donné au demandeur son billet, non endossé, pour les autres \$100 ;

“ Considérant que le témoignage du dit Massé relativement à ces \$500 et \$100 est corroboré par les aveux, réticences et contradictions du demandeur sur le même sujet ;

“ Considérant qu'il est prouvé par le témoignage du notaire Garand, corroboré par le demandeur, que la dite composition, le consentement donné aux dits billets de composition et de faveur, et le transport fait par le demandeur de sa dite obligation au défendeur, le onzième jour d'Aout 1875 devant le dit M^{re} Garand, Notaire, n'étaient que diverses parties d'une seule et même transaction et affaire, et que, d'après les circonstances prouvées, la dite somme de \$600, comprise dans les dits billets de \$500 et de \$100, qui sembleraient avoir été la considération du transport fait au défendeur le onse d'Aout 1875 de l'obligation susdite du 20 de mai précédent, n'était réellement qu'une partie des avantages faits au demandeur par le dit Massé pour obtenir son consentement à la dite composition ;

“ Considérant qu'il est prouvé que plusieurs des créanciers du dit Massé qui ont signé le dit acte de composition et décharge, ont obtenu, pour ce faire, des billets de faveur du dit Massé, et qu'ils en ont même reçu de l'argent en paiement de partie de ces billets de faveur ;

“ Considérant que les créanciers du dit Massé et nommément, le demandeur, n'ont pas donné un consentement libre et désintéressé à la dite

composition et décharge, mais que ce consentement a été obtenu au moyen de valeurs données et de valeurs promises par le dit Massé, à l'insu du défendeur, aux dits créanciers et au demandeur en particulier ;

“ Considérant que le consentement du défendeur à l'endossement du dit billet de \$500, a été obtenu par la tromperie du dit Massé, aidé du dit demandeur ;

“ Considérant qu'il est prouvé par les aveux du demandeur, que les billets qui font la base de l'action en cette cause comprennent le montant resté dû sur les billets de composition consentis par le dit Massé au demandeur, le dit billet de \$500 et le dit billet de \$100 avec les intérêts calculés sur iceux ; et que ces billets sont ceux donnés en exécution des conventions contenues dans l'acte de création d'hypothèque du 27 avril, 1876, en question dans cette cause ;

“ Considérant que le demandeur, tout en faisant la dite composition, avait gardé ses titres de créance originaire et que, sur la faillite subéquente du dit Massé, il a produit sa réclamation contre la succession de ce dernier, comprenant, comme il le dit, les anciens et les nouveaux billets, déduction faite du prix des chapeaux en question ;

“ Considérant que la dite composition du dit Massé avec ses créanciers n'a pas été réellement ce qu'elle paraît et ce qu'elle aurait dû être ;

“ La Cour déclare la dite composition et décharge du 27 juillet, 1875, fausse et simulée, en autant que le défendeur peut être concerné, et la déclare nulle et comme non-avenue quant à lui, ainsi que l'endossement des dits billets de composition endossés par le défendeur en faveur du demandeur en conséquence d'icelle, et déclare nuls et comme non-avenus, quant au dit défendeur, l'acte de création d'hypothèque en question en cette cause consenti par lui, dit défendeur, en faveur du demandeur, le 27 avril, 1876, devant M^{re} Garand, Notaire, et les deux billets sur lesquels l'action du demandeur en cette cause est basée, savoir, le billet pour \$1,268.68, daté, Montreal, 7 avril, 1876, fait et signé par le dit défendeur, payable à sept mois de sa date, à l'ordre du demandeur au bureau de la Banque du Peuple, pour valeur reçue, et celui pour \$1200, daté, Montréal, 7 Août, 1876, aussi fait et signé par le dit défendeur, payable à trois mois de sa date à l'ordre du dit deman-

deur au dit bureau de la Banque du Peuple, pour valeur reçue; lesquels billets n'ont pas été ainsi consentis en faveur du demandeur pour une considération valable et légitime;

"Et, en conséquence, le défendeur, comme il l'offre par son plaidoyer, devra rétrocéder au demandeur, quand il en sera requis par ce dernier, la dite obligation du 20 de mai, 1875, et déboute l'action du demandeur avec dépens, distraits, etc."

Sir A. A. DORION, C. J., delivered the judgment of the majority of the Court of Appeal, the grounds of which are set forth in the recorded judgment as follows:—

"Considérant que le 27 Juillet, 1875, H. E. Massé, marchand, du village de Richelieu, aurait fait avec ses créanciers un concordat ou acte de composition par lequel il aurait promis de leur payer une somme de 50 pour cent du montant de leurs créances par paiements égaux en 4, 8 et 12 mois, avec endossement, et que de leur part les créanciers auraient donné à Massé une décharge pour la balance;

"Et considérant que l'appelant, créancier de Massé pour une somme de \$5,377.11, aurait été partie à cet acte de composition, et l'aurait accepté sans préjudice à une hypothèque qu'il avait;

"Et considérant que le 11 Août, 1875, l'intimé, pour satisfaire à l'obligation contractée par Massé, aurait endossé ses billets aux termes de son acte de composition, et nommément trois billets pour la somme de \$896.18½ chacun, daté du 17 Juillet 1875, et payables l'un à 4 mois, un autre à 8 mois, et le troisième à 12 mois de date, lesquels billets formant le montant des versements dus à l'appelant sur cet acte de composition, lui furent alors remis;

"Et considérant que l'intimé n'a consenti à endosser les billets de Massé qu'à la condition expresse que celui-ci lui donnerait une hypothèque sur ses immeubles, et lui transporterait tout son fonds de commerce et les créances qui lui étaient dues d'après ses livres de compte, ce qu'il a fait par acte passé le même jour, 11 Août 1875, devant M. Bessette, notaire.

"Et considérant que par acte passé devant Garand, notaire, le 11 Août 1875, l'appelant aurait transporté à l'intimé sans garantie une obligation avec hypothèque sur les biens de Massé, pour la somme de \$5,280, cette obligation consentie par Massé le 20 Mai 1875, pour assurer le

paiement de la créance de l'appelant mentionnée en l'acte de composition du 27 Juillet 1875, et pour lequel transport Massé lui aurait donné un billet de \$500 endossé par l'intimé, et un autre billet de \$100 sans endosseur;

"Et considérant qu'il est prouvé que ce transport n'a été fait que pour couvrir un avantage indirect et secret que l'appelant a exigé de Massé au montant de \$600 en sus des 50 pour cent du montant de sa créance, pour signer l'acte de composition, et que de fait l'appelant n'avait aucune hypothèque sur les biens de Massé, vu que cette obligation du 20 Mai 1875 avait été consentie en fraude des droits des autres créanciers de Massé, qu'elle n'avait jamais été enregistrée, et que de plus elle était pour la même créance que celle portée en l'acte de composition;

"Et considérant que ces deux billets de \$500 et de \$100 ont été donnés à l'appelant sans cause valable pour donner à l'appelant un avantage sur les autres créanciers de Massé et en fraude de leurs droits, et que tel avantage secret est prohibé par la loi;

"Et considérant que les deux billets de l'intimé sur lesquels cette action est basée, savoir, un billet de \$1268.68, daté à Montréal le 7 Avril 1876, payable à sept mois de sa date, et un autre billet de \$1200 daté à Montréal le 7 Août 1876, payable à trois mois de sa date, et tous deux signés par l'intimé à l'ordre de l'appelant, ont été consentis par l'intimé pour la balance due sur les trois billets de Massé endossés par l'intimé, qui ont été donnés à l'appelant en exécution de l'acte de composition du 27 Juillet 1875, et pour les deux billets de \$500 et \$100 donnés pour le transport de l'obligation du 20 Mai 1875;

"Et considérant que la balance due sur les trois billets du 28 Juillet 1875, avait une cause légitime, mais que les deux billets de \$500 et \$100 qui avaient été donnés pour une cause prohibée par la loi, ne pouvaient par aucune reconnaissance subséquente devenir une cause valable d'une obligation consentie par l'intimé;

"Et considérant que sous ces circonstances l'intimé est bien fondé à demander que les dites sommes de \$500 et de \$100 soient déduites du montant des billets du 7 Avril et du 7 Août 1876;

"Et considérant que l'appelant a depuis l'acte de composition du 27 Juillet 1875, reçu

une somme de \$250.50 pour le prix de chapeaux et d'un moulin à coudre, que Massé lui avait expédiés avant l'acte de composition, et que cette somme de \$250.50 doit également être déduite de la balance due par l'intimé sur ses deux billets;

"Et considérant qu'après déduction faite des trois sommes de \$500, de \$100, et de \$250.50, plus \$15.21 pour intérêts, le dit intimé doit encore au dit appelant sur les deux billets sur lesquels cette action est portée une somme de \$1602.97, avec intérêt sur cette somme à compter du 10 Novembre 1876 ;

"Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure à Montréal le 19 Déc. 1877 ;

"Cette cour casse et annule le dit jugement, et procédant à rendre le jugement qu'aurait dû rendre la dite cour supérieure, condamne l'intimé à payer à l'appelant la somme de \$1602.27, avec intérêt sur cette somme à compter du 10 Nov. 1876, et déclare la dite obligation du 27 Avril 1876, et les deux billets du 7 Avril et du 7 Août 1876 nuls et de nul effet quant au surplus ;

Et cette cour condamne l'intimé à payer à l'appelant les frais encourus tant en cour inférieure que sur l'appel."

RAMSAY, J. I concur in the judgment that has just been rendered, but I differ so completely from some of the reasons that have been given that I must trespass on the time of the Court to explain the grounds on which I think the judgment should be in part reversed. We have recently had two cases involving similar questions. The first was that of *Arpin v. Poulin*,* arising out of the same transaction as that now before the Court. In that case Poulin, the endorser, pleaded in answer to Arpin's action that he had fraudulently combined with Massé to give a seeming assent to the act of composition and discharge, while, in fact, he had obtained a preference which altered the position of the endorser. The action was dismissed in the Superior Court, and we confirmed the decision. It appears to me that the true principle was laid down in that case, namely, that between the endorser for credit and the creditor the condition of the security was the discharge of the debtor for a certain

sum. Next came the case of *Marchand & Wilkes*, 3 L.N. 318. By the judgment of this Court the action was maintained on the ground that Wilkes was only then seeking to recover on the notes which were given for the avowed amount of the composition. I dissented, as it appeared to me that this was laying down a rule different from that laid down in the case of *Arpin v. Poulin*. The condition of the endorsement is destroyed by the preferential notes, whether the fraudulent creditor keeps them, or circulates them or sues on them. The present case is distinguishable from both these cases. The defendant raises two grounds of objection to paying his notes. First, there is the fact of the hypothec granted by Massé to Martin, it is said in fraud of the creditors, and the fact that Martin retained his notes of the original indebtedness in addition to those of the composition. Second, that he had fraudulently concealed a quantity of straw hats and a sewing machine. As to the first ground, I do not see that there was any fraud of which Poulin can specially complain in the matter of the hypothec. It was referred to in the deed of composition, and Martin there stipulated his right to retain it. He evidently thought that the retention of the hypothec implied the right to retain the old notes. This was certainly a strange error for him to make ; but Poulin thought the same thing, and on the very day the composition notes were given—the 11th August—he passed a deed with Martin in which he stipulated that Martin should make him over the whole of the old notes and the hypothec, for \$600, in a note of Poulin's for \$500 and in a note of Massé for \$100. Poulin, therefore, was charged with \$600, which was not due, and for which he must have credit now ; but he was not defrauded. The hats and the sewing machine stand on a different footing, and if Poulin had been a simple endorser I should have held that he was discharged from his liability. But when we come to look into the matter it appears that the whole of Massé's estate was given over to Poulin, not to Massé, and that he dealt with it as his own. He makes no offer to account for that property, or to tender it back, but he says : "discharge me of my liability and I shall keep what I have got." This would be palpably unjust. All the plaintiff has a right to is the deduction of the value of the straw hats and sewing machine, which seem to have been worth about \$250. So that he will have to pay his notes, less \$850, and any interest he may have paid on these sums since the 11th August, date of the transaction with Martin.

Judgment reformed, Cross, J., dissenting.

Lacoste & Globensky for appellant.

Archambault & David for respondent.

* 1 Legal News, 290 ; 22 L.C.J. 331.

The Legal News.

VOL. IV. JANUARY 22, 1881. No. 4.

DAMAGES AGAINST CORPORATIONS.

In order to present the judgment in *Morrison & The Mayor, etc.*, entire in the present issue, we defer other matters till next week.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, Dec. 21, 1880.

MONK, RAMSAY, JJ., BABY, A. J., DOHERTY and
JETTE, JJ., *ad hoc*.

MORRISON (plff. below), Appellant, and THE
MAYOR et al. OF MONTREAL (defts. below), Re-
spondents.

*Damages—Municipal Corporation—Alteration of
Street Level.*

Under the jurisprudence of the Province of Quebec, the damage occasioned to adjoining proprietors by the alteration by the City Council of the level of a roadway in the City of Montreal gives rise to an action of indemnity against the City.

The Statute 27 & 28 Vict., c. 60, s. 18, does not exclude such action of indemnity, but merely provides a mode of procedure, and if the corporation desires to have the compensation estimated by commissioners, it must move the Court to appoint them. If it fails to do so, it acquiesces in the ordinary procedure, and is foreclosed from raising the objection afterwards.

The case of Mayor & Drummond (22 L. C. J. 1) commented on.

There were two appeals (Nos. 58 and 59) under the above title, and arising from the same matter. The action in each case was instituted for the recovery of damages for loss of rent, alleged to have been suffered by the appellant, Lady Lafontaine, in consequence of the alteration by the Corporation of the level of Little St. James street. The first action was brought 16th June, 1871, and the second action on the 3rd December, 1873; the damages claimed by the second action being

for the two years which elapsed after the bringing of the first action. Both actions were dismissed in the Court below by Mr. Justice Mackay, on the following grounds:

"Considering that plaintiff has not proved her allegations material, and that she has not proved and shown right to have any damages from defendants for any of the causes mentioned in her declaration;

"Considering that all that defendants did in the matter of Little St. James Street, altering of level of roadway, was within the scope of defendants' authority, and not wrongously or negligently done, and that no compensation was or is due to plaintiff as claimed by her from defendants;

"Considering further the exceptions of defendants well founded and proved;

"Considering that even if plaintiff could have claimed any compensation for the altering of the level of the street or roadway of Little St. James street, it had to be sought by other process than this action, to wit, by resort to the tribunal provided by the 27-28 Victoria chapter 60."

RAMSAY, J. This is an action of damages for lowering the roadway of Little St. James street, by which the access to appellant's property was interrupted, and by which, she alleges, she suffered material damage, and particularly by loss of rent of her property situated on that street, also for an injunction to compel the respondents to restore the street to its former level. With the latter part of this action we have nothing to do, for by a deed of the 6th November, 1873, a compromise was effected, by which the Corporation paid to the parties aggrieved, and among others to the appellant, Dame Julie Morrison, Lady Lafontaine, certain sums of money for damages, and agreed to lower the footpath or "sidewalk" within a reasonable time, on the condition that they would discontinue their actions. There was, however, a reservation that Lady Lafontaine should have the right to continue her action for damages for "loss of rent." The conclusions of this action are, therefore, reduced to a claim for damages "for loss of rent," and for no other cause.

The respondent contends that the ordinary Courts have no jurisdiction over the matter in litigation. The Court below held, if there be

any compensation for the altering of the level of the street, "it had to be sought by other process than this action, to wit, by resort to the tribunal provided by the 27 & 28 Vic., chap. 60."

If this reason be founded, it is needless to carry our investigation further, for we have no authority to decide the issues. It is well, however, to bear in mind that what respondent has to establish is an absolute absence of jurisdiction over the matter. Nothing less will do, because the defendant did not decline the jurisdiction by preliminary plea—*exception déclinatoire*—within four days from the return of the writ, as required by law. (Arts. 107 and 114, C. C. P.) "*Le déclinatoire ratione personae ne peut être, pour la première fois, proposé en cause d'appel.*" Carré, 11, 142, note; 143, note 1st. "*Le déclinatoire ratione materiae peut être proposé en tout état de cause, même en appel.*" 11, 147, art. 170, note 3rd, and No. 128. See also *Gray & Dubuc*, 2 L. R., Q., p. 234. The omission to raise the question of jurisdiction by the usual exception was probably due to the fact that it was not generally considered, at the time this action was begun, that a suit for damages, such as this is, fell within the provisions of the 27 & 28 Vic., chap. 60. But in May, 1876, the Judicial Committee held, in the case of *Drummond & The Mayor, &c., of Montreal*, that a claim for damages for closing a street so as specially to injure the plaintiff's property, could only be urged before Commissioners appointed under the provisions of the 27 & 28 Vic. The opinion of the Judicial Committee is thus expressed:—"It seems to them (their Lordships) that if he (respondent) has any claim, it is one to be prosecuted under the provisions of the Act relating to expropriations by this Corporation (27 & 28 Vic., c. 60), which will be hereafter considered." And further on they say:—"Their Lordships, however, do not think it necessary to decide in this appeal the question thus raised (question of right of indemnity), since in whatever manner it may be determined, and whatever may have been the case before the 18th section of the 27 & 28 Vic., c. 60, was passed, they think that this enactment, by requiring that the compensation payable to any party, 'by reason of any act of the Council for which they are bound to make compensation,' shall be ascertained in

the manner prescribed by the Statute, excludes by necessary implication actions of indemnity for damage in respect of such acts. It is enough, therefore, to say that, in their view, the Corporation, having acted within their powers, the plaintiff's claim (if sustainable at all) is of a kind which would fall to be determined by the Commissioners under the special Act." (22 L.C.J. p. 9.)

Formal as this opinion appears to be, appellants contend that it cannot be considered conclusive authority, because it is contrary to the jurisprudence of our Courts, and because the point was never urged before the Courts here or before the Committee.

It may perhaps be said there was no jurisprudence on the point because it never was raised, so far as I know. But there have been many actions such as this, and common acceptance is perhaps as conclusive in a matter of this kind as if it had been formally decided.

Be this as it may, it is very certain that what has never been contradictorily argued cannot be considered definitively settled. I am, therefore, of opinion that we are not precluded from deciding differently from that judgment, and that it is our duty now to examine the question, and to express our opinion upon it. The enquiry seems to me to divide itself into two questions:—

1st. To what cases does the 27 & 28 Vic. apply?

2nd. Does the Act create a tribunal or only a *mode de procédure*?

With regard to the first question, the portion of the Act 27 & 28 Vic., chap. 60, which refers to the special "tribunal," is under the rubric "Expropriation and special assessment." After repealing the former legislation, so far as inconsistent with this Act (sec. 10), the Statute goes on to enact that "the Council of the said city of Montreal shall have power to order, by resolution, the opening or widening of streets, public highways, places or squares, or the construction of public buildings, and to order at the same time that such improvement shall be made out of the city's funds, or that the cost thereof shall be assessed," &c., (sec. 11.) Then if the Council of the said city determines, by resolution, to undertake or carry out "any of the said works," and if the person who is seized or possessed as proprietor of any lot of ground

or real property necessary to be acquired for the purpose of such work will not come to an amicable settlement, the "price or compensation shall be fixed and determined in the following manner," (sec. 13), that is to say, Commissioners shall be appointed by the Superior Court. The Statute then goes on to enact (sec. 18) as follows:—"All the provisions contained in the thirteenth section of the present Act, with regard to the appointment of Commissioners and the mode of ascertaining the value of the pieces or parcels of land or real estate taken by the Corporation of the said city, shall be and are hereby extended to all cases in which it shall become necessary to ascertain the amount of compensation to be paid by the said Corporation to any proprietor of real estate, or his representatives, for any damage he or they may have sustained by reason of any alteration, made by order of the said Council, in the level of any footpath or sidewalk, or by reason of the removal of any establishment subject to be removed by reason of any other act of the said Council for which they are bound to make compensation, and with regard to the amount of compensation for which damage the party sustaining the same and the said corporation shall not agree; and the amount of such compensation shall be paid at once by the said Corporation to the party having a right to the same, without further formality." Now, it is contended by the Corporation that by this section compensation for damages done and not acknowledged are placed on precisely the same footing as compensation for lands to be expropriated. I think this is a misinterpretation of the section, for it would follow that no action of damage would lie against the Corporation for any act attributable to the Council;—the words are: "or to any party by reason of any other act of the said Council for which they are bound to make compensation." Not only there would be no direct action, but there would be no mode by which the party aggrieved could set the law in motion. It is the Council and its officers that give the notices, and move the Court or Judge for the order. If they don't acknowledge that there is any ground of indebtedness, of course they don't move. I think, therefore, that where the Corporation does not take any action, the common law remedy remains to the party aggrieved. Further to illustrate my

meaning, let me suggest another case, which does not entirely turn upon Article 18. Suppose the Council of the city resolved to expropriate from lands for the purpose of widening a street, without any amicable settlement, and without any nomination of Commissioners, will it be seriously contended that the party expropriated would not have a common law action, as well for the loss of his land, if he be content not to revendicate it, as for the damage specially arising from the dispossession without due notice? I have heard no attempt to answer this but by saying the party aggrieved could proceed by *mandamus*. Now, let us examine the depth of this suggestion.

I do not propose to enter minutely into a consideration of the limits of the jurisdiction of the writ of *mandamus*, about which there has often been some difficulty in England, a difficulty perhaps complicated in a self-governing possession of the Crown by the question of the effect of recent legislation. Suffice it to say, that it appears very questionable indeed whether the writ would lie to compel the Corporation of Montreal to affect to come to the conclusion that they "are bound to make compensation," in order to give the party complaining an opportunity of testing his case. The words of the Statute only oblige the Corporation to proceed in this way where they "are bound to make compensation, and with regard to the amount of compensation for which damage the party sustaining the loss and the said Corporation cannot agree." The first step, then, the Court, on application for *mandamus*, would have to perform would be to determine that at all events there was a *prima facie* case of damages made out. That is to decide an important part of the issue. If the Court can determine this, owing to the reticence of the Corporation, why should it not decide the whole? Again, what would be the object of the *mandamus*? It would be to get an order from the Superior Court to compel the Corporation to make an application to the Superior Court, after a useless notice to the public. No case of a *mandamus* being granted under such circumstances has been brought under our notice. Generally the writ will not be granted to compel the exercise of a discretionary power; nevertheless, even where a power is discretionary, if it be used with manifest injustice, the Court will grant

the writ to prevent a failure of justice. It is, therefore, argued by the respondents that as the appellant has, in an extreme case, the right to a *mandamus*, therefore she is not deprived of all remedy by interpreting the Statute so as to exclude the operation of the common law. I think this is an inversion of the ordinary argument. We argue that the *mandamus* should be granted, because there is no other convenient remedy; but it does not seem to be deducible from this that there is no ordinary remedy, because, where there is none, there is the remedy by *mandamus*. I, therefore, think that the sections referred to in the 27 & 28 Vict. contain a direction to the Corporation to proceed in a particular way, in certain cases. I do not think the Corporation can be compelled so to proceed where the question is simply as to compensation for damages which they do not admit to be due.

But let us take for granted that this conclusion is wrong, and that there is a mode open to appellant to set the law in motion to enable her thereby to recover compensation unjustly denied, it does not appear to me, as the record before us stands, that we should be justified in dismissing the action for want of jurisdiction. Respondent contends that the 27 & 28 Vict. has established a tribunal for cases like this, and that, having done so, there is no remedy at common law. It is also the contention of the Judicial Committee. In the case of *Drummond & The Corporation*, they say "it establishes a tribunal consisting of Commissioners for determining the value of property expropriated, and a system of procedure for such cases." To be perfectly correct, their Lordships should have said "*to be expropriated*" (a correction of some importance, for it avoids the necessity of a tedious digression.) Now, I question much whether the proposition is precisely correct, either in English law or by the law of France. In Mr. Dillon's work on "*Municipal Corporations*," Vol. II., p. 902, he says: "If, in such cases, the Statute provides a specific remedy, or a remedy other than an ordinary civil action, that remedy alone can be pursued." And in a note to the second edition we find: "This remedy (one by a recent Statute) excludes a civil action for all damages necessarily occasioned." Without having the letter of the law before one, it is not easy to

say absolutely that the cases cited have no bearing on the proposition of the author; but, so far as I can see, only one requires any mention. In *Flagg & The City of Worcester*, Merrick, J., after saying that there was no common law remedy, *i. e.*, action or right of action, for damages suffered in repairing highways, under the common law obligation to repair, said the party suffering could only proceed according to a special remedy allowed by law, and this remedy was complete in itself. "But under this restriction no damage can be done. To avail themselves of the remedy provided by the Statute, ample opportunity is afforded to parties deeming themselves to be aggrieved. Their damages are, in the first instance, to be determined upon their own application to the Selectmen of the town or Mayor and Aldermen of the city," &c. Elsewhere the judge says: "If their adjudication upon the question is not satisfactory, upon proper proceedings being had, they may be ascertained by a jury, as in the case of taking lands upon the location of highways." From the statement of the law by Merrick, J., Mr. Dillon was not justified in stating his proposition in the unqualified manner he has done. The general principle seems to be that "an existing jurisdiction cannot be taken away except by precise and distinct words. *Galsworth v. Durant*, 8 W. R. 594—R. Fisher's Dig. 5077. And the concurrent jurisdiction of courts of equity is not excluded by the adoption of equitable principles by courts of law. *Hawshaw v. Perkins*, 2 Swans. 546. It has been the tendency of our jurisprudence here to treat remedies as cumulative where the new enactment is not unequivocal, particularly where the common law remedy is to be set aside. As an instance of this, I may mention that we have invariably held that the special remedy, by information of the Attorney-General, had in no way destroyed the old common law action. In *re The Adventurer*, decided by Judge Black, in the Vice-Admiralty Court at Quebec, he held that although the Legislature had vested in the Trinity Board the right of fixing the remuneration of pilots for extra services, still this did not take away from the Vice-Admiralty Court its jurisdiction over the matter, and the promoter was awarded extra allowance. 1 S. V. A. C. p. 105. Our legislation, too, indicates the same thing. In defining the jurisdiction of the

Superior and Circuit Courts, express words are used to limit the jurisdiction of each Court. Arts. 1053 and 1054 C. C. P. And by Art. 28 C. C. P. the exclusive jurisdiction of the Circuit Court and of the Admiralty are expressly preserved.

It would not be difficult to find numerous other illustrations to establish the principle relied on. Thus, for instance, by Sec. 125 of the Insolvent Act of 1875 (38 Vic., c. 16):—"All remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien or right of property upon, in or to any effects or property in the hands, possession or custody of an assignee, may be obtained by summary order," and then the Statute adds the words, taking away the jurisdiction of the Courts, "and not by any suit or other proceeding of any kind whatever." Under this section, since this case was argued, we reversed a judgment maintaining a *saisie gagerie* in the hands of the assignee.

In France it seems always to have been held that the civil court could take cognizance of commercial cases raised before it voluntarily, although there was a *tribunal de commerce* established in the town. 2 Carré, p. 148. But the tribunal of commerce could not take cognizance of the civil matter by any consent. *Id.* For instance, le Code de Commerce Français, Art. 51, is in these words:—"Toute contestation entre associés, et pour raison de la société, sera jugée par des arbitres." Notwithstanding the precision of these words it has been decided that: "L'incompétence des tribunaux de commerce pour connaître des contestations entre associés, doit être proposée *in limine litis*, avant toute défense au fond. Les juges ne sont pas tenus de renvoyer d'office devant des arbitres, si les parties ne le demandent pas." Sirey, Codes annotés. The reason of this doctrine is succinctly explained by Henryon de Pausey in his treatise "*de l'autorité judiciaire*", ch. 33. After showing the fundamental distinction between *incompétence*, *l'abus du pouvoir*, et *l'excès du pouvoir*, he goes on to say: "*Nous voyons cependant que de bons esprits ont pensé que l'on devait distinguer les tribunaux ordinaires des tribunaux extraordinaires; que les premiers, investis de la plénitude de l'autorité judiciaire, pouvaient, sans excès de pouvoir, connaître de toutes les affaires portées devant eux, quelque fut le domicile des par-*

ties et la nature de l'objet contentieux; mais qu'il n'était pas de même des tribunaux extraordinaires, par exemple, que si un tribunal de commerce statuait sur une affaire civile, son jugement pouvait être attaqué non-seulement comme incompetent, mais comme renfermant un excès de pouvoir."

There is yet another reason why the judgment in the case of *Drummond & The Mayor* should not be followed. The Statute 27 & 28 Vic. does not organize a new tribunal; it merely directs a new form of procedure to avoid inconvenience. The jurisdiction is still left to the Superior Court. The Court or Judge, on application and after notice, appoints the Commissioners, who are nothing more than *experts* carrying on their proceedings under the authority of the Court on an order the terms of which are fixed by Statute. Sec. 13, S. S. 5. It is to the Court the Commissioners report, and by the Court the judgment is rendered, for it is always the judicial decree that binds, however it may be described. Sec. 13, S. S. 12. If, then, it is only a *mode of procedure*, surely it can be waived by the consent or acquiescence of both parties. Dig. L. XVII., 2, 156, § 4. Where it is only a question of damages, there is no assessment to be determined, and therefore there is no possible public interest, as the Corporation and the party complaining can fix the compensation privately, and it is evident they can become bound by the judicial decree without the interference of any other party. Only one word more to close this point. The Corporation and the party had the right to agree to a compensation, could they not have fixed the compensation by reference to arbitration; if so, on what principle can it be said they may not refer it to the arbitrament of the Court.

A case of *Blais & Rochelle* (13 L. C. J. 277) has been mentioned, I can hardly say insisted upon. What was, in effect, decided there was that, under the particular statute referred to, (C. S. L. C., cap. 51) a survey was a condition precedent to all further proceedings. The action was brought without that formality, there was no acquiescence, and the action was dismissed. But I understand it has been decided since that time on the same statute that where the party would not make the survey, the direct action lay. I am therefore of opinion that under a fair interpretation of Sect. 18, 27 & 28

Vic., cap. 60, a party claiming damages from the Corporation for any act of the Council, has a right to proceed by action, that if the Corporation desires to have the compensation estimated by commissioners, it must move the Court to appoint them, and that if it fails to do so, it acquiesces in the ordinary procedure and is foreclosed from complaining later.

The learned counsel for the Respondent has again put forward an argument similar to that advanced by the Corporation in the cases of *Drummond* and of *Grenier*. It does not appear to me to be necessary to reiterate the opinion of the Court on the point raised in these cases. I adhere to the doctrine laid down by the Court in the former case, which, so far as I know, has not been over-ruled, and to the opinion I then expressed. I also concur in the opinion expressed by Mr. Justice Taschereau. It is therefore only necessary for me to say in general terms, that it is fully admitted now that the question must be decided by the ancient law of France; consequently, under no circumstances, should I feel it incumbent on me to enter into a lengthy dissertation to show that the English cases do not really maintain Lord Kenyon's dictum in *Gov. of East India Co. v. Meredith*, that the dictum itself was *obiter* and supported by a manifestly untenable argument, that Buller, J., made a distinction between the civil law and the common law, and that the decision of Grove, J., was governed by "the clause in the Act which empowers commissioners to award satisfaction," which was "decisive against this action." To which, I may add, it is also decisive against its being any authority on the abstract question. The holdings in *Beckett v. Midland Ry. Co.*, in *Metropolitan Board of Works v. McCarthy*, and in *Lyon v. Fishmongers Co.* do not appear to me to be fairly susceptible of the species of minimisation they have been subjected to in *Bell v. The Corporation of Quebec*, and taking them in connection with Lord St. Leonard's decision in *Ogilvy's case*, I am led to entertain the hope that the common law of England does not refuse an action, because doing so would give rise to an infinity of actions. As I read the law of England by the cases cited, I am led to the conclusion that the general principle is the same as that of our law, and that the damage must be direct, or, as one of the judges said, it must affect the *corpus*

of the property. There may be a difference between the two systems of law as to what constitutes a damage to the *corpus*, if that is to be the formulary used. Most of the authorities cited by the Corporation take ground which harmonizes perfectly with that taken by this Court in *Drummond's case*. For instance, Dufour admits that indemnity is due by l'Administration if they "*exercent une action directe sur la chose d'autrui*," and that l'Etat is not liable for the "*dommage indirectement causé*." These citations are both submitted by the Respondent. To them I may add the following words from the same author in the same No.: "*Il n'y a, en ce sens, de réparation due que là où il y a eu un acte préjudiciable et injuste*." As instances of these cases, we have been referred to Steffani's case, which seems, so far as I understand it, to be a violation of the principles just laid down by Dufour, and he notes it as being a very extreme case. To the quotation of Larombière by Respondent, I might suggest the addition of the following Number, No. 11, in order to get the full meaning of the author, which does not appear to differ from the view of this Court. But the author who has really treated the question most fully is Demolombe, whose authority has been marvellously misunderstood. Instead of reading No. 699 of that author in connection with 699 A and 699 B, the corporation, following the Privy Council, seeks to make out an authority from the example contained in 699 B, separating it from the rule it is placed to elucidate. This is not a fair way of dealing with the author's opinion. Shortly stated, Demolombe's theory is this: that by the opening of streets the neighboring proprietors acquire rights of property which cannot be interfered with without indemnity, which is implied in every act regulating the public right. He says it is the doctrine of the Roman Law, of the old French Law, (still in force here) and that it is based on public faith and equity, and therefore it is the law of France now. Hence, if you affect the approaches to his house permanently, or the flow of water from his roof, or his lights, then there is a claim for indemnity. I fancy other examples might be suggested, as for instance his drainage into a public sewer. To quote Demolombe, in support of the pretensions of the Corporation, is a wonderful effort.

He is as energetic and eloquent an adversary of the half-hearted doctrine of the "respectfuls" of the *Conseil d'Etat* as one can desire to meet with.

In the case of *Drummond*, I drew attention to the fact that the idea of indemnity on both sides runs through the whole of the Corporation Acts, and that particularly with regard to streets the proprietor might be actually made to pay, for the convenience or advantage accruing to his property by opening a street. The supposition that he might be obliged to pay for the opening to-day and be deprived of it to-morrow, without indemnity, is too monstrous to require comment.

To these remarks I have only to add that I think the Corporation has the power by the statute to alter the level of the street. I also think the Corporation had the right to do so without the special authority of the act. From the moment it was vested with the charge of the streets, it inherited the privileges as well as the liability of the State with regard to them. But neither the State nor the Corporation has a right so to alter them as to make the foot-path inaccessible from the road. Such an alteration is *faute* to all intents and purposes, and if it gives rise to special damage to anyone, that damage gives right of action. For all practical purposes, it may be laid down as the rule of our law that where there is special damage to the property of an individual, there is either *faute* or interference with a right of property, consequently there is right to indemnity. So that whether the question be envisaged from the side of fault or from that of interference with a material right of property, the result is the same, and the plain equity of the law triumphs.

This was fully admitted by the Corporation in this very case, and they paid certain damages to the proprietors near the place of this alteration, and bought off their demand in demolition by undertaking to make the foot-path a suitable height above the roadway.

The only question, then, that remains is whether Lady Lafontaine has suffered from loss of rent alone. If we turn to the facts, the right of action seems undeniable. Prior to 1868 it was thought desirable to convert Little St. James street from a narrow into a wide street. For this purpose Commissioners were appointed,

and proceeded to value the losses of those expropriated, and to assess those who were supposed to profit by the alteration. There was no indemnity to appellant, for the enlargement of the street took place on the north side, while her property was situated on the south side; but her two houses were assessed, one to an amount of \$774, and the other to the amount of \$981, equal to \$1,755, or more than the rental for a year and a half of the whole property. It then became apparent that by widening the north side of the street the approach by St. Lambert's Hill was rendered more abrupt, and a by-law was passed to lower the level of the roadway of St. James street. Appellant's counsel say that this was so done in order to avoid the law, which specially reserves indemnity for lowering a footpath. Be this as it may, the lowering the level of the roadway had the effect of leaving the footpath on the south side from 2 feet 6 inches to 4 feet above the level of the road. It was evidently impossible to leave a precipice of this kind, and the Corporation engineers devised the brilliant scheme of making a slope stretching three feet into the street, and diminishing by so much the breadth of the roadway for which appellant had just been mulcted in the whole of her revenues for over a year and a half. The street was thus cut down, the new part between the 7th August and the 9th October, 1868, and the old portion was cut down between the 17th June and the 12th July, 1869. In June, 1871, the action was brought. On the 5th November, 1873, the Corporation came in and agreed to pay the appellant \$2,728.41 damages to her property, save and except any damages she might have incurred for loss of rent, which last the Corporation refused to acknowledge. The effect of this transaction was to give appellant an indemnity of \$973.47 over and above all she had to pay for widening the street. Thus reduced, Lady Lafontaine's action appears to me to be a very narrow one, requiring very special proof, and that I find totally wanting. We have, it is true, evidence that the property is diminished in value from 25 to 30 per cent. by reason of this state of the footpath, but it seems to me that this is covered by the general indemnity. She has not shown that one tenant left her houses on that account, or that she lost any rent on that account. One witness, who

described himself as an hotel-keeper, leased two rooms of one of the houses for a restaurant, at the rate of \$400 a year. The premises were totally unfit for the object for which he took them; they were in "very poor condition." He undertook to make all the repairs. He conducted his restaurant on temperance principles. His capital was \$50, and perhaps \$100 of furniture. After a year's occupancy, he collapsed, and could only pay \$250. He says it was all owing to the pavement. Perhaps it would not be difficult to suggest other reasons for Mr. Jordan's failure.

Mr. Larocque says he knows the appellant leased her property lower since the widening of the street than before. This is not conclusive, as an old rule teaches.

Mr. Lamothe tells us of the leases he passed in 1870 and 1871, but he says nothing for the time before that, and no other witness has told us any more about it. All we know is derived from the appellant's own statements in answers to interrogatories, and that is not evidence for her. It is, therefore, hardly necessary to examine it; but it may be said that even if it were evidence, it would not make out her case. It comes to this, that up to 1870, that is till after the change referred to, she had had the "best class of tenants," the Grand Trunk Railway Company and the Government, and that from them she had received higher rents than she received after they gave up the premises, leaving them in very bad condition, as Mr. Jordan tells us. But between May, 1870, and the relaying of the pavement the rent of the property evidently increased, for in 1872 the large house was leased at \$500 a year till May, 1873, and \$600 for the following year.

I therefore think the appellant has failed to make out any damage from loss of rent owing to the change of level of the footpath, and that her action was properly dismissed, and I would dismiss this appeal with costs. The judgment will be based on motives different from those given in the judgment appealed from. The appeal No. 58 must be dismissed for a similar reason, but we do not decide that Lady Lafontaine's action was barred by the arrangement with the Corporation, if her right had existed in fact.

JETTÉ, J., concurred in the judgment, but was of opinion, on the question of damages, that

there was evidence which might have justified the Court in allowing some damages. However, he did not think it expedient to enter a dissent on this point.

BABY, J., agreed with the opinion expressed by Mr. Justice Jetté as to the proof of damages. On the question of law he concurred in the opinion of Mr. Justice Ramsay.

DOHERTY, J., made some observations upon the question of damages. There was no legal proof of damages under the head of loss of rent, and that was the only thing to which the appellant had reserved her right.

MONK, J., also concurred in the judgment, and in Mr. Justice Ramsay's appreciation of the law.

Judgment confirmed in both cases.

Barnard & Monk, for Appellant.

R. Roy, Q. C., for Respondents.

GENERAL NOTES.

A young lawyer of more extensive legal information than Biblical lore, was engaged in the prosecution of a criminal case. The prisoner proved a good character previous to the commission of the offence. The zealous advocate sought to break the force of this proof. He asked an older member of the bar to give him some anecdote which would forcibly illustrate the idea, that although a party might enjoy a good character, he might, at the same time, be a great villain. The old lawyer, knowing his young legal friend's ignorance of scriptural incidents, told him of Judas Iscariot, who, whilst he enjoyed the confidence of his companions, basely betrayed for a small sum of silver the most confiding and affectionate of friends. The young attorney enthusiastically remarked: "By Jove! that's good, and fits my case; where did you get it?"

The following is an extract from a lecture by Chief Justice Horton, of Kansas: "An Ohio judge was a fatalist, and used to determine perplexing cases by chance. An Indiana judge once had a number of cases to pass upon, and he gave decision turn about for plaintiff and defendant, declaring afterward that they were the best decisions he ever made, as every one of them was sustained by the Supreme Court. General Bela M. Hughes told an anecdote of David R. Atchison, who was a Senator from Missouri and Vice-President of the United States. He was a district judge in Missouri before he was a Senator, and was holding a term of Court in a frontier county. The lawyer for the plaintiff quoted Blackstone. The opposing counsel, in reply, said that he was astonished that his learned brother should quote from an English law-book, written by an English nobleman, in an American court of justice—a book written by a man who had kissed the bloody hand of George III. At the close of his speech, Judge Atchison declared that he was surprised at such a proceeding in his court. He gave judgment for the defendant, and declared that if the attorney for the plaintiff ever again read in his hearing a book written by a red-coated Tory he would fine him for contempt."

The Legal News.

VOL. IV. JANUARY 29, 1881. No. 5.

MONEY FOUND.

The right of the finder of lost money to maintain an action for the recovery of it from a person not the owner, has been maintained by the Supreme Court of Pennsylvania in the case *Hamaker v. Blanchard*. The plaintiff was a female servant employed in a hotel, and while engaged in her duties she found a roll of bank notes in the public parlor. She reported the circumstance to the proprietor, who said he thought the money belonged to a guest who had transacted some business in the parlor. The servant entrusted the money to her employer that it might be restored to the supposed owner. But it appears that the guest referred to had not lost the money; the owner was not discovered, and it was admitted at the trial that he was unknown. Under these circumstances it was held that the servant could recover the money from her master. The decision appears to be in conformity to the general rule established in England by several decisions, that the finder is entitled to the article or money found against all the world but the owner, and the place where it is found does not create an exception.

PRESENTS TO JUDGES.

It is well known that the Ontario Legislature has since 1868-69 (32 Vic., c. 1, s. 1) supplemented the Dominion salaries of judges by an annual grant of \$1,000 to each Superior Court judge in Ontario. The first grant was based upon the consideration that the salaries attached to the office were insufficient. The \$1,000 first granted were paid, but the Act was, we believe, disallowed by the Dominion as irregular and unconstitutional, for the judges were not in any way under the control of the Ontario Legislature, and the salaries were not paid by it. The next and subsequent annual grants by this Legislature were professedly based upon the fact that the judges performed certain work in the Province as Commissioners of Devises, 33 Vic., c. 5, (Ontario). There can be no doubt that under whatever name the grant

of \$1,000 be disguised, it is in the nature of a present to the judge by an outside party, and since the days of Bacon, Lord Chancellor of England, who was ruined by the reception of gifts, we are not aware that there have been two opinions as to the danger of such gifts, and we believe they have been unheard of in the history of the British judiciary since the reign of James I., under whom Bacon was Chancellor. Those of our readers who read Macaulay's charming Essays when they came out some forty years ago, will remember his discussion in the article on Francis Bacon, of the question whether the gifts received by the Chancellor from suitors were in the nature of presents or bribes. As early as the Mosaic code the reception of gifts by a judge has been condemned. "Judges and officers shalt thou make thee in all thy gates, which the Lord thy God giveth thee, throughout thy tribes; and they shall judge the people with just judgment. Thou shalt not wrest judgment; thou shalt not respect persons, neither take a gift, &c." This injunction is in Deuteronomy, and is repeatedly found in the Scriptures. The celebrated Alexander Hamilton, in the *Federalist*, number LXXXIX, says: "Next to permanency in office, nothing can contribute more to the independence of the Judges than a fixed provision for their support."

* * * In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resource on the occasional grants of the latter." What is the difference between the case under consideration, and the judges receiving an annual grant of one thousand dollars from the city of Toronto, liable to diminution or stoppage at the whim or caprice of the City Council? Would such a grant be allowed in the governments of India? The grant is a present from a suitor. Take an instance:—The case of John Severn, appellant, and the Queen, respondent, was decided by the Ontario Court of Queen's Bench in favor of the Province of Ontario. It was taken to the Supreme Court by John Severn, and decided there in favor of the individual suitor against the Province of Ontario. (2 Supreme Court R.

70.) This matter was discussed in the Ontario Legislature in February, 1879, and it was then unanimously agreed by the Legislature as follows:—"That a representation ought to be made to the Dominion Government with a view to said allowance being hereafter assumed by the Dominion, and said allowance ought not to be continued as to appointments hereafter made." We are curious to know what correspondence has taken place between the Ontario Government and the Dominion Ministers on the subject, and whether any steps have been decided upon to remedy the anomalous position of the Ontario judiciary.—*Gazette, Montreal.*

NOTES OF CASES.

EXCHEQUER COURT OF CANADA.*

OTTAWA, Jan. 12, 1881.

Coram FOURNIER, J.

DOUBRE, suppliant, and THE QUEEN, defendant.

Treaty of Washington—Employment and remuneration of Canadian Counsel—Right of Counsel to recover by Petition of Right—35 Vic. c. 25.

Under Article 25 of the Treaty of Washington it is provided: "that each of the high contracting parties shall pay its own commissioner and agent or counsel; all other expenses shall be defrayed by the two Governments in equal moieties."

By 35 Vic. c. 25 (D.) the Fisheries Articles of the Treaty of Washington were made part of the law of Canada, and a Queen's Counsel residing in the city of Montreal was one of the Canadian Counsel before the Commission sitting at Halifax. There was evidence showing that the agreement entered into between the Minister of Marine and Fisheries and the suppliant at the city of Ottawa, was to the following effect: that the suppliant was to receive \$1,000 per month on account of his expenses and services whilst the Commission was sitting at Halifax, and that a further sum, to be settled upon after the award of the Commissioners, would be paid. The suppliant removed with his family from Montreal to Halifax, and was exclusively engaged in connection with this matter for 240 days. The Government paid suppliant \$8,000, and by his

petition the suppliant claimed that the amount received only paid his expenses, and that he was entitled to a further sum of \$10,000 for the value of his services. The amount involved before the Commission was \$12,000,000, and the amount awarded in favor of Canada was \$5,500,000.

Held, 1. That this agreement constituted a valid contract, and that a Petition of Right did lie to recover the amount due him under such agreement.

2. That the agreement entered into having been made at the city of Ottawa, the rules of evidence in force in the Province of Ontario were applicable, and suppliant's evidence on his own behalf was therefore admissible.

3. That as the evidence adduced proved that the remuneration received by the suppliant, when engaged as counsel in important cases, was \$50 per day and \$20 for expenses, when his services were required outside of his own Province, the Court would grant him \$8,000 out of the \$10,000 claimed by his petition, being at the rate of \$50 per diem and \$20 for expenses, for the 240 days he was employed before the Commission.

Haliburton, Q. C., and *Ferguson*, for suppliant.
Lash, Q. C., and *Hogg*, for the defendant.

COURT OF QUEEN'S BENCH.

MONTREAL, Nov. 17, 1880.

Sir A. A. DORION, C. J., MONK, RAMSAY,
CROSS, BABY, JJ.

LONGPRÉ et al. (contestants below), Appellants,
and VALADE (opponent below), Respondent.

Registration—Resiliated Deed.

The registration of a deed of sale of an immoveable, by a creditor of the vendee, after it has been cancelled by the parties to it, without any fraudulent intention, will not revive or give effect to it, so as to enable the creditor to seize the property in the possession of the vendee.

The appeal was from a judgment of the Superior Court, Montreal, Jetté, J., May 31, 1879, maintaining an opposition to the seizure of an immoveable. The facts were these: The appellants obtained judgment against one Corbeille, and on the 7th Aug. 1878, took out execution and seized a lot of land in Lachine. The respondent, Valade, filed an opposition alleging that on the 9th May, 1877, he had sold the lot

* Head note to Supreme Court Report. By Geo. Duval, Esq.

in question to Corbeille, but that on the 8th May, 1878, Corbeille had retroceded it to him; that neither of these deeds had been registered, and that Corbeille had no right of ownership at the time the lot was seized.

The appellants then discontinued the seizure, but immediately registered the deed from opposant to Corbeille, and then took out a new writ of execution, and two days later, the opposant registered the deed of retrocession. He subsequently filed an opposition to the second seizure. The present appellants contested this opposition, but the contestation was dismissed by the following judgment of the Court below:

"La cour, etc.

"Considérant que l'acte de vente du 9 mai 1877, consenti par l'opposant au défendeur F. Corbeille, n'a conféré à ce dernier de droits sur l'immeuble saisi en cette cause que tant qu'il a été en existence, savoir, jusqu'à la date de la rétrocession faite par le dit Corbeille au dit opposant, le 8 mai 1878 ;

"Considérant que par cette rétrocession le titre du dit Corbeille à la propriété du dit immeuble s'est trouvé complètement annulé et anéanti ;

"Considérant que l'enregistrement que les demandeurs ont fait faire du dit acte du 9 mai 1877, après son annulation et anéantissement par la rétrocession susdite et avec pleine connaissance de la dite rétrocession, n'a pu faire revivre le dit acte et conférer au dit défendeur Corbeille des droits de propriété dans le dit immeuble auquel il n'avait plus aucun titre ;

"Considérant que l'article 2085 du Code Civil ne peut être invoqué par les demandeurs, attendu qu'ils n'ont acquis aucun droit sur l'immeuble en question pour une valeur ou considération nouvelle par eux donnée depuis la dite rétrocession ;

"Considérant qu'il n'a pas été prouvé que le dit acte de rétrocession ait été fait par fraude, mais qu'il a été fait de bonne foi entre le défendeur et l'opposant ;

"Considérant que par suite du dit acte de rétrocession l'opposant est redevenu dès le dit jour 8 mai 1878, propriétaire de l'immeuble saisi en cette cause, et l'était lors de la dite saisie, et que par suite il est bien fondé à demander main-levée de la dite saisie de son immeuble ;

"Benvoie la contestation de la dite opposition

et maintient la dite opposition, déclare la dite saisie du dit immeuble nulle et de nul effet, et en donne main-levée au dit opposant ; le tout avec dépens," etc.

In appeal, the judgment was confirmed.

RAMSAY, J. I concur in the judgment that has just been rendered. It seems to me to be unquestionable that registration will not revive a deed which has been cancelled by the parties to it. Registration gives effect to rights, it does not create them. The legal title was not in Corbeille at the time of the seizure. Again, there is no evidence of fraud. It seems that no money passed either at the time of the sale or of the retrocession, so the transaction in no way affected the solvability of Corbeille. But we are told the object of the sale was to commit a fraud on the law by giving a seeming qualification to Corbeille to admit of his being a magistrate. If this were a fraud, it is not such a fraud as would affect the opposants. I may, however, say that there is no fraud at common law in procuring property for the purposes of obtaining a qualification, and the consideration is not of any consequence.

Judgment confirmed, Cross, J., dissenting.

Longpré & David, for Appellants.

P. Pelletier, for Respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, Nov. 17, 1880.

Sir A. A. DORION, C.J., MONK, RAMSAY, CROSS, BART, JJ.

DONALDSON (deft. below), Appellant, and

CHARLES (plff. below), Respondent.

Action in Ejectment—Procedure—Incidental demand.

The lease ran from 1st May, 1879, to 1st May, 1880 ; held, an action instituted 1st May, 1880, was premature, the last day of the term belonging wholly to the debtor.

To the principal demand in ejectment an incidental demand for damages (for illegally remaining in possession after 1st May) was subsequently added, and the defendant pleaded to the incidental demand, asserting his right to remain in possession. Held, that although the principal demand was premature and inadmissible, and the incidental demand contained no conclusion for ejectment, yet the incidental demand might, under the issue joined, be treated as if it were

incorporated in the principal action, so as to sustain a judgment of expulsion.

The appeal was from a judgment of the Superior Court, Montreal, Jetté, J., May 25, 1880, as follows :

La cour....

" Considérant que la demanderesse par sa demande principale requiert l'expulsion du défendeur son locataire, de la maison à lui louée par bail en date du 19 Septembre 1878, et continué pour une année de plus à compter du 1er Mai 1879 au 1er Mai 1880, la dite maison décrite comme suit : " That certain three story stone store, &c. " et ce pour les raisons suivantes, savoir : 1o défaut de paiement du loyer du mois d'Avril, \$50 ; 2o défaut de paiement de la taxe d'eau, \$29.70 ; 3o coût d'une vitre de l'étalage ou de la vitrine du magasin loué, brisée par le défendeur, \$50, et que par sa demande incidente la demanderesse invoque en outre la détention illégale par le défendeur de la dite maison, après l'expiration du bail à lui consenti, et réclame en conséquence en addition aux conclusions de sa première demande des dommages s'élevant à \$300 à raison du tort souffert par son nouveau locataire, vu l'impossibilité où il a été de prendre possession de la dite maison depuis le 1er Mai par le fait du défendeur ;

" Considérant que le défendeur a plaidé à ces deux demandes disant : quant au loyer, que la demanderesse était sans droit pour le lui demander, le 1er Mai, le terme qu'il avait pour le payer n'étant pas échu ; quant à la taxe d'eau, qu'elle n'est pas due à la demanderesse mais à la ville, et que le défendeur l'a payée à qui de droit ; quant à la vitre brisée, qu'elle l'a été par un défaut de construction de la maison louée et non par la faute du défendeur, qui par suite n'est pas responsable du dommage souffert par la demanderesse en conséquence ; enfin que par un nouveau bail intervenu entre l'agent autorisé de la demanderesse et lui, il est en droit de garder la dite maison pour une autre année du 1er Mai courant au 1er Mai 1881, et que par suite il n'est pas responsable des dommages soufferts par le second locataire à qui la demanderesse a pu louer de nouveau le dit magasin ;

" Considérant que la prétention du défendeur quant au loyer réclamé est bien fondée ; qu'aux termes du bail invoqué, le loyer n'était dû que le 1er Mai ; que le dernier jour du terme appartenait en entier au débiteur, et que l'action de la

demanderesse intentée ce jour-là était prématurée, et que la consignation que le défendeur a faite du dit loyer au greffe de cette cour est valable et suffisante ;

" Considérant que la taxe d'eau n'était pas due à la demanderesse, qu'elle n'avait aucun droit de la réclamer du défendeur, et que ce dernier justifie l'avoir payée à qui de droit ;

" Considérant qu'il est établi en preuve que la vitre dont la demanderesse réclame le coût n'a pas été brisée par le fait et la faute du défendeur, mais bien par suite d'un vice de construction de la maison louée, dont le défendeur ne peut être responsable ;

" Considérant que la demanderesse ne pourrait avoir droit à des dommages contre le défendeur, pour la détention illégale par ce dernier de la maison en question, qu'en autant que ces dommages seraient réalisés et constatés contradictoirement, et que dans l'espèce aucune telle réclamation n'est établie, renvoie les diverses prétentions de la demanderesse à raison de tout ce que dessus. Mais considérant que le défendeur n'a pas prouvé avoir obtenu de la demanderesse ou de son agent autorisé un nouveau bail de la dite maison pour une autre année à compter du 1er Mai courant (1880), et que par suite il est resté en possession de la dite maison ou magasin sus-décrit illégalement après le temps accordé par la loi pour déménager, depuis le 1er Mai courant ;

" Condamne le défendeur à délaisser et livrer à la demanderesse, sous trois jours de la signification du présent jugement les lieux sus décrits, en faisant place nette ; sinon, et le dit délai expiré, sera le dit défendeur expulsé des dits lieux par main de justice, les biens, meubles et effets qui s'y trouveront jetés sur le carreau, et la demanderesse mise en possession et jouissance paisible des dits lieux. Et la cour, vu les prétentions erronées des deux parties, les condamne à payer chacune leurs frais, condamnant néanmoins spécialement la demanderesse à supporter les frais d'enquête occasionnés par l'examen des témoins Houghton, Macdonald, Tighe et Chester produits par elle, et Philbin, McArthur, Haycroft, Lee, Baldwin et Ste. Marie produits par le défendeur ; et condamne le défendeur aux frais d'enquête occasionnés par l'examen des témoins suivants, savoir : le défendeur lui-même, Macdonald, Cushing et la demanderesse, et la cour réserve à cette dernière tout recours en dommages que

de droit, s'il y a lieu, à raison de la détention de la dite propriété sans droit après l'expiration de son bail."

RAMSAY, J. The appellant leased a house from the respondent, who brought an action seeking the expulsion of the appellant and claiming rent, water-rate, and damages for broken glass. This action was instituted on the 1st May, 1880, the day on which the rent fell due. During the proceedings, and subsequently to the 1st of May, respondent instituted an incidental demand for damages suffered by her, owing to appellant's detention of the property after the expiration of the lease, and adding a special conclusion for damages, but without renewing the conclusion of the original demand for expulsion. Appellant, by his plea to the incidental demand, asserts his right to remain in possession. The principal demand was rejected by the Court below, because the rent was not due when the action was brought, because the taxes were not due to the Plaintiff but to the Corporation of the city, and because the breaking of the glass was attributable, according to the evidence, to the working of the house, and not to any act of the Appellant. The damages alleged in the incidental demand, were said to have been suffered by one Tighe, the tenant of Respondent, and therefore they were refused, but the Court granted the prayer of the principal demand because the Appellant had completed what would otherwise have been an imperfect issue by his allegation that he had a right to remain in possession of the premises after the 1st May, when his lease was plainly at an end. Appellant now seeks to obtain the reversal of this judgment by saying that the incidental demand had no connection with the principal demand, and was therefore wholly inadmissible; and accordingly, that the principal demand being rejected, there were no conclusions to justify a judgment for expulsion. There can be no doubt that the procedure is irregular in the extreme, as was remarked by the learned judge in the Court below. Nevertheless, he held that the incidental demand was only an addition to the principal demand, and that as the issue was complete by the plea, as to whether appellant should be expelled or not, he could decide it without going beyond the whole conclusions. We cannot say that

this decision is wrong. The judge had all the issues before him, and the whole evidence as perfectly as it ever could be brought before him in another suit, and we think he was justified in treating the incidental demand as incorporated in the principal demand, it having been so treated by both parties; although the ordinary practice is undoubtedly to put separate conclusions to the incidental demand.

The appeal is therefore dismissed with costs.

Judgment confirmed.

Archambault & David, for Appellant.

Ritchie & Ritchie, for Respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, Dec. 24, 1880.

Sir A. A. DORION, C. J., MONK, CROSS, BABY, JJ.
DARLING et al. (defts. below), Appellants, and
BARBALOU et al. (plffs. below), Respondents.

Trade Mark—Resemblance.

B. & Co. registered a trade mark for the laundry soap made by them, the mark consisting of the imprint of a horse's head, with the words "The Imperial Laundry Bar" stamped on the face of each piece, and the words "J. Barsalou & Co., Montreal," on the opposite side. D. & Co. subsequently manufactured a soap with the imprint of the head of a unicorn and the words "A. Bonin, 115 St. Dominique street, Very Best Laundry" on the face, (without any words on the opposite side). Held, that there was no resemblance or similarity between the marks which could deceive persons of ordinary intelligence, and D. & Co. could not be restrained from continuing the manufacture of their soap.

The appeal was from the following judgment, rendered by the Superior Court, Montreal, Rainville, J., on the 30th of April, 1879:

"La cour, etc.

"Considérant que les demandeurs ont prouvé les allégations de leur déclaration;

"Considérant que la marque par les défendeurs sur le savon par eux manufacturé et vendu est une imitation frauduleuse de la marque de commerce des demandeurs, et de nature à tromper les acheteurs en général;

"Considérant que l'impreinte de la licorne est faite de manière à représenter la tête d'un cheval plutôt que celle d'une licorne;

"Considérant qu'il est prouvé que des ache-

teurs ont été trompés sur la ressemblance des dites deux marques ;

"Déboute les défendeurs de leur défense, et les condamne à payer aux demandeurs la somme de \$100 de dommages, avec intérêt, &c."

The action was brought by the respondents, claiming the sum of \$2,000 damages for infringement of a trade mark on soap. The plaintiffs, J. Barsalou & Co., alleged that they had been manufacturing soap for several years past in Montreal, and in 1877 had registered a trade mark for the article manufactured by their firm; that the distinctive feature of this trade mark was a horse's head, which was impressed on each piece of the soap; and that the defendants, Darling & Brady, had imitated this mark with the intention of deceiving the public into buying the soap made by them instead of Barsalou's soap.

The appellants pleaded to this suit, that the soap manufactured by them was not an imitation of Barsalou's soap; that it bore the imprint of the head of a unicorn, and not that of a horse; that there was no similarity in the inscription, the Barsalou soap having the words, "The Imperial Trade Mark Laundry Bar" stamped on the face of each piece, with the name "J. Barsalou & Co., Montreal," on the opposite side; whereas the soap manufactured by appellants had the words "A. Bonin, 115 St. Dominique street, Very Best Laundry," on the face, without any words on the opposite side.

The evidence showed that the respondents' trade mark was the imprint of a horse's head, with the words, "The Imperial Laundry Bar," stamped on the face, and the words "J. Barsalou & Co., Montreal," on the opposite side. The soap manufactured by appellants had the head of a unicorn, with the words "A. Bonin 115 St. Dominique St. Very Best Laundry," on the face, without any words on the opposite side. The arrangement of the words was also different.

MONK, J., pointed out that the imprint and general appearance of the two heads differed considerably, besides the addition of the horn to the head of the unicorn. There was no resemblance between the two marks and the accompanying words that could deceive any one with ordinary intelligence. Moreover there was no evidence that the respondents had suffered any damage.

The judgment in appeal is as follows :—

"Considering that it is in evidence that the print used by appellants on their soap is not the same as the one used by respondents in conformity to their trade mark, and there is no such resemblance or similarity between the two that the difference cannot easily be noticed by any person with ordinary care and intelligence;

"And considering that there is error in the judgment rendered by the Superior Court, at Montreal, on the 30th day of April, 1879;

"This Court doth reverse the said judgment of the 30th of April, 1879;

"And proceeding to render the judgment which the said Superior Court should have rendered, doth dismiss the action of the respondents, and doth condemn them to pay to the appellants the costs incurred as well in the Court below as on the present appeal."

Judgment reversed.

Cruikshank & Cruikshank, for Appellants.

Beique, Choquet & McGoun, for Respondents.

COURT OF QUEEN'S BENCH.

MONTREAL, NOV. 19, 1880.

Sir A. A. DORION, C. J., MONK, RAMSAY, CROSS, BABY, JJ.

LA SOCIÉTÉ PERMANENTE DE CONSTRUCTION (plif. below), Appellant, and ROBINSON (deft. below), Respondent.

Delegation—Acceptance—Registration.

The appeal was from a judgment of the Superior Court, Montreal, Papineau, J., Feb. 28, 1879, reported in 2 Legal News, p. 148, where the facts will be found.

The appellant submitted the following propositions :—

1. L'engagement contracté par Robinson de payer à l'acquit de Léonard la créance de la Société appelante a, *ipso facto*, engendré un lien de droit entre Robinson et elle, et a, *de plano* et sans acceptation antécédente, ouvert en faveur de cette dernière, un droit d'action contre le premier.

2. S'il était besoin d'acceptation, une acceptation expresse n'était pas nécessaire, une acceptation implicite ou tacite était suffisante.

2. Cette acceptation s'infère dans l'espèce de l'acte de vente par Léonard à Robinson.

RAMSAY, J. The first proposition of Appellant seems to be that by the form of Respond-

ent's undertaking, it was not only an indication of payment, but an absolute obligation in favor of appellant, which did not require acceptance. I am not aware that there is any substantial distinction between the delegation, as used in the Code (art. 1173), of a new debtor, and the *indication de paiement*, as used in the Code (art. 1174). Neither creates novation. Both are within art. 1029, that is, both require acceptance. This seems always to have been held. Directly in the case of *Patenaude & L'Erigé du Laplant*, indirectly in the case of *Mallette v. Hudon*. It is the common law rule of all donations that they must be accepted, and what is the giving of a debtor, without consideration, else than a donation? It is the donation of extra security. It is no answer to say that the action may be brought without previous acceptance. That is clear, although there are contrary decisions. The action is sufficient acceptance, if in time. I, therefore, think appellant's first proposition is untenable. His second proposition appears to me to be correct; but when he comes to the third proposition, that the registration is evidence of acceptance, I must again dissent from appellant's view. It is evident that the registration by another, being no act of the creditor, cannot be a declaration of his will, and consequently would only be a fictitious acceptance, which is not what is contemplated by law. But the 7 Vic., cap. 22, really amounts to this, that the right of the creditor shall be maintained, no matter who carries the Deed to the Registrar. This would probably have been the decision of the Courts, if there had been no such clause. Publicity was the object of the Registration law, and that was acquired by the transcription in the public register. The reasoning on the Edict of 1711 does not appear to me to be conclusive. The question of the necessity of opposition introduces new elements which it is not necessary now to discuss. It seems to have been the opinion of the Court in *Patenaude & L'Eriger* that the registration was an acceptance. In *Hudon & Mallette* a doctrine incompatible with that was held. It was there held that the direct action on the debt could be maintained by the creditor on a registered deed if there was no acceptance.

At the argument some stress was laid on the fact that Robinson had made payments to ap-

pellant. It is clear Robinson's act would not tell more against him than his deed with Leonard. It is the act of the appellant in receiving this money that is important, and that must be drawn from the receipts. The doctrine on that point seems to have been properly laid down in *Poirier & Lacroix* (6 L. C. J.) The receipts in this case do not imply an acceptance of the new debtor, but only of the money he brought on account of the debt of the original debtor. No acceptance, therefore, can be gathered from the simple fact of the payment. It is almost too elementary to require special remark, that no act of the person indicated as the person to pay can amount to an acceptance, else the rule that acceptance is necessary would disappear.

The letters certainly do not of themselves form an acceptance. But we are asked to draw from the respondent's letters that the letters from the appellant were an acceptance. If the answer contained clearly the proposition accepted, we might not require the production of the letters themselves. But the letters are not conclusive.

Judgment confirmed.

Loranger, Loranger, Pelletier & Beaudin for Appellant.

Robertson & Co. for respondent.

SUPERIOR COURT.

MONTREAL, June 30, 1880.

Before PAPINEAU, J.

DESJARDINS et vir v. GRAVEL et ux., & LANGVIN dit LACROIX, opposant.

Sheriff's Sale—Rights of Lessee.

The lessee of an immovable property about to be sold by sheriff's sale, has no right to make an opposition afin de charge to the sale, based on a notarial lease of the property to himself, prior to the seizure.

The plaintiff, a hypothecary creditor, having obtained judgment against the defendant, caused an execution to issue against the immovables hypothecated in his favor.

The opposant, lessee of the premises under a notarial lease for a year, duly registered, filed an opposition *a fin de charge*, based on his lease prior to the seizure.

The plaintiff contested the opposition by a *défense en droit*.

PAPINEAU, J., maintained the contestation and dismissed the action, the judgment being as follows :

" La cour, etc.

" Considérant que la demanderesse, créancière des défendeurs, n'est pas tenue en loi d'entretenir le bail fait par ses débiteurs et auquel elle n'a pas été partie ;

" Considérant que ce bail ne peut pas empêcher la demanderesse de faire saisir et vendre l'immeuble pendant ce bail dont la durée n'excède pas un an ;

" Considérant que si la vente par décret ne dépouille pas le débiteur saisi de sa jouissance de l'immeuble saisi jusqu' à l'adjudication, elle l'en dépouille certainement du moment de l'adjudication, et met fin au bail, en mettant fin à la jouissance du bailleur, qui, de son côté, ne peut plus faire jouir son preneur ;

" Considérant que si d'un côté le bail en cette cause est de fait antérieure à la saisie réelle des immeubles des défendeurs, de l'autre côté ce bail n'a conféré aucun droit de propriété à l'opposant dans, ni aucune charge sur les immeubles loués, et qu'il ne possédait même ceux-ci que pour les défendeurs et au nom de ces derniers, et dans le seul but et pour la seule fin d'en avoir la jouissance accordée par le bail en question ;

" Considérant que l'opposant, ne dérivant sa jouissance que des défendeurs, ne peut l'exercer plus longtemps que la loi ne permet à ceux-ci de la conserver eux-mêmes, c'est-à-dire après l'adjudication ou décret ;

" Considérant que l'opposant, en demandant de conserver sa jouissance au-delà du temps de la vente par décret jusqu' à la fin de la durée naturelle de son bail, a demandé ce qu'il n'a pas droit d'obtenir ;

" Considérant d'ailleurs que si toutefois il était possible à l'opposant de faire cette demande, il ne pourrait être reçu à la faire qu'en offrant pour le profit du créancier saisissant une partie du loyer proportionnée au temps que le bail aurait à courir après l'adjudication, et qu'il ne l'a pas offerte ;

" Considérant que le droit de l'opposant se résout, par la vente ou décret des immeubles à lui loués, en une créance privilégiée sur le produit de ces immeubles pour la plus valeur donnée par ses travaux aux dits immeubles, conformément à l'Art. 2101 du C. C., et que sa

dite opposition afin de charge est mal fondée, et que la contestation ou défense en droit faite par la demanderesse à l'encontre de la dite opposition est bien fondée ;

" La Cour maintient la dite défense en droit, &c."

Opposition dismissed

Loranger, Loranger & heaudin for opposant.

R. & L. Laflamme for plaintiff contesting.

SUPERIOR COURT.

MONTREAL, JAN. 15, 1881.

Before PAPINEAU, J.

DELAND et al. v. DESRIVIERES, and CARTER, T. S.

Things exempt from seizure—Alimentary Debt—

C. C. P. 558.

Objects which are exempt from seizure by reason of being given as aliment, may nevertheless be seized and sold for an alimentary debt.

The defendant contested the *saisie-arrêt* before judgment which had issued in the cause,—among other reasons, because by the condition of the will of defendant's father the thing seized was *insaisissable*.

The plaintiffs answered that the thing seized was not exempt from seizure for a claim of the nature of plaintiffs', being for provisions sold to defendant for the subsistence of his family.

PAPINEAU, J. Les choses achetées des demandeurs étaient en général des choses alimentaires. Cela suffit pour maintenir la saisie, d'après l'art. 558 C. P. C., dernier paragraphe. Nous n'avons pas à déterminer sur cet incident pour quelle portion la créance des demandeurs leur donnait droit de saisir la pension alimentaire que le père du défendeur lui avait légué sous condition d'inaliénabilité et d'insaisissabilité. Il suffit qu'une partie seulement soit le prix d'aliments fournis pour ne pas déclarer la saisie nulle.

Petition rejected.

Trudel & Co., for plaintiffs.

Groffion, Rinfret, Dorion & Laviolette for defendant.

GENERAL NOTES.

The sudden and unexpected demise of Mr. Keeler, member for East Northumberland, is announced. Mr. Keeler was one of the most vigorous opponents of the Supreme Court Act, and the author of a bill introduced last session, and also during the present session, for the repeal of the Act.

The Legal News.

VOL. IV. FEBRUARY 5, 1881. No. 6.

APPEAL BUSINESS.

The statistics of the business before the Court of Queen's Bench sitting in appeal, for the year 1880, contain some figures of interest. It appears that the total number of appeals in civil matters during the year for the District of Montreal was 150, of which 148 were from judgments of the Superior Court, and 2 from judgments of the Circuit Court. The districts from which the appeals came are as follows:—Montreal 122; Ottawa 7; St. Francis 9; Richelieu 3; Bedford 4; St. Hyacinthe 3; Iberville 2. There were also 3 criminal cases. The number of judgments rendered in 1880 was 116; 87 confirmed and 29 reversed.

At Quebec the total number of judgments rendered was 69; 45 being confirmations and 24 reversals.

The following table shows the totals:—

<i>Civil Cases, Montreal.</i>	
S. C.	Confirmed 85
	Reversed 26
C. C.	Confirmed 2
	Reversed 3
Total 116	
<i>Civil Cases, Quebec.</i>	
S. C.	Confirmed 40
	Reversed 22
C. C.	Confirmed 5
	Reversed 2
Total 69	
<i>Criminal Cases, Montreal.</i>	
	Confirmed 3
<i>Criminal Cases, Quebec.</i>	
	Confirmed 1

Under the head of judgments confirmed are included all cases where the judgment is reversed without the respondent being condemned to pay costs; and under judgments reversed are included reversals of decisions in Review, though the original judgment is restored.

We will give in another issue an alphabetical table of all the judgments rendered in the District of Montreal during 1880, with the result.

RIGHTS OF LESSEES.

An interesting question relating to the rights of lessees, where the premises leased are sold by sheriff's sale during the term of the lease, has recently been much discussed before the Superior Court. Two decisions on the subject have been rendered by the same judge. In *Desjardins v. Gravel*, (noted at p. 39) Mr. Justice Papineau held that the lessee has no right to make an opposition *a fin de charge* to a sale under execution; and in another case of *McLaren v. Kirkwood*, noted in the present number, the same Judge has granted a summary petition for a writ of possession, presented by the purchaser at sheriff's sale, for the expulsion of the tenant before the expiration of his lease. The latter case was very fully argued by Mr. Bethune, Q. C. for the petitioner, and by Mr. Kerr, Q. C., for the tenant, and the judgment contains an elaborate examination of the law. The argument and the judgment are to appear in full in the *Jurist* reports. The decision in the first case does not seem to admit of much doubt, but the question presented in *McLaren v. Kirkwood* is one of greater difficulty, and it is to be regretted, perhaps, that it is not to be discussed at present in a higher court, no appeal having been taken from Judge Papineau's decision.

COURT OF QUEEN'S BENCH.

MONTREAL, December 21, 1880.

DORION, C.J., MONK, RAMSAY, CROSS & BABY, JJ.

THE QUEEN v. LEVI ABRAHAMS.

Obtaining money by false pretences—Several counts in indictment—Power of Attorney-General to delegate authority to present indictment to Grand Jury.

This was a case reserved by the Chief Justice at the September (1880) term of the Court of Queen's Bench, Crown side, at Montreal.

The defendant, Levi Abrahams, was indicted for obtaining money by false pretences. The indictment contained four counts. By the first count the defendant was charged with having obtained by false pretences, \$20 from one Thomas Freddy. By the second he was charged with having obtained \$20 from one James Heaton. By the third, with having obtained \$10 from Thomas Freddy. And by the fourth, with having obtained \$10 from

James Heaton. Each count alleged that the money was obtained, by false pretences, on the same day (25 Sept. 1880).

A true bill having been found by the grand jury, the defendant moved to quash the indictment. (1) Because the defendant was charged with four distinct offences, which could not be joined in the same indictment. (2) Because the indictment had been submitted to the grand jury without the preliminary formalities required by sect. 28 of the Criminal Procedure Act of 1869 (32 & 33 Vict., c. 29) having been observed.

The Chief Justice allowed the case to proceed, intimating that he would reserve the questions raised, should the defendant be found guilty.

The defendant was convicted on the two last counts only.

The following questions were reserved :—

1. Whether the Attorney-General could delegate his authority to direct that the indictment be laid before the grand jury, and whether the direction as given on the indictment was sufficient to authorize the grand jury to enquire into the charges and report a true bill.

2. Whether if the indictment was improperly laid before the grand jury, it should have been quashed on the motion made by the defendant.

3. Whether the several counts could properly be included in the indictment.

4. Whether the rulings on the above questions are correct, and whether there was sufficient evidence of false pretences to justify a conviction on the third and fourth counts.

As to the first and second questions, the indictment was submitted to the grand jury by the following direction appearing on the face thereof:—"I direct that this indictment be laid before the grand jury. L. O. Loranger, Atty-General, by J. A. Mousseau, Q.C., C. P. Davidson, Q.C." Messrs. Mousseau and Davidson were the two Queen's Counsel authorized to represent the Crown in all the criminal proceedings during the term.

As to the fourth question, the evidence adduced at the trial was to this effect: That Preddy and Heaton went, on the 25th Sept. 1880, to the defendant's shop in St. James Street, and that the defendant sold them for \$20, they paying \$10 each, two railway passes, representing to them that they were valid passes, and would enable them to travel by the Grand

Trunk Railway, from Montreal to Chicago. One of the passes was issued by the Grand Trunk Railway Co., authorizing A. Carey and one to travel on the Grand Trunk from Montreal to Port Huron, and was to expire on the 30th Sept. 1886. The other pass was issued by the Chicago & Grand Trunk Railway Co., and authorized A. Carey and one to travel on their road from Port Huron to Chicago. This pass had already expired before it was sold by the defendant. It was also proved that after having sold the passes, the defendant told Preddy and Heaton, before they left the shop, that one of them would have to take the name of Carey, to which no objection was made. Preddy and Heaton swore, however, that they did not understand the meaning of this until after leaving the shop, when they looked at the passes and found they were not transferable. They then made inquiries, and were informed the passes were valueless.

Held, [Dorion, C.J., and Cross, J., dissenting] that the authority under the statutory provision in question is not one which can only be exercised by the Attorney or Solicitor-General personally, but may be delegated to any counsel authorized to represent the Crown in proceedings before the Criminal Court.

2. [By the whole Court], that the several counts could properly be included in the same indictment. *Reg. v. De Castro*, (see 3 Legal News, pp. 376, 393.)

3. [By the whole Court], that on the evidence the case was properly left to the jury.

Conviction affirmed.

C. P. Davidson, Q.C., for the Crown.

Keller, for the defendant.

SUPERIOR COURT.

MONTREAL, NOV. 30, 1880.

Before JOHNSON, J.

De BELLEFEUILLE et al. v. LA MUNICIPALITÉ DU VILLAGE DE ST. LOUIS DU MILE END.

Municipal Corporation—Quasi Contract.

A corporation can come under a liability by a quasi-contract, in the same manner as an ordinary person, and therefore a municipal corporation which avails itself of, and is benefited by, services rendered in procuring its act of incorporation is liable for such services.

JOHNSON, J. The defendants are a corporate body created by 40 Vic. c. 29. Some of the in-

habitants of the old municipality, as it appears, wanted to have it divided into two, and petitioned Parliament for that purpose, and got the present statute passed, employing the plaintiffs professionally to get it done; and it is for these services rendered before the Act of incorporation, that the action is brought against the new corporation. There is no doubt that the services were well and effectively rendered; but the corporation answers the action by pleading, 1st, by a *défense en droit*, and, 2nd, by a peremptory exception, that it had no existence as a corporation, at the time the services were rendered; and that the plaintiffs were really employed by the gentlemen individually who got this Act passed, and have no recourse except against them personally; and they, the defendants, having at that time no existence, could neither themselves employ nor authorize others to employ the plaintiffs. It was contended for the plaintiffs that there had been a *quasi-contract*; but it was answered no, because there was no body capable of *quasi-contracting*; there was no person at all either capable or incapable of contracting. This corporation (which if it had existed at the time would have been a person in law) had not then been created, and it was not merely the case of capacity or incapacity of an existing person, but the very existence of any party, person or corporation whatever, whether capable or incapable of contracting.

The plaintiffs cited articles 1041 and 1042 of the C. C. They are founded on the authority of Pothier and of Marcadé. The text of the articles is as follows. Article 1041 says: "A person capable of contracting may, by his lawful and voluntary act, oblige himself toward another, and sometimes oblige another toward him, without the intervention of any contract between them." Art. 1042 reads: "A person incapable of contracting may, by the *quasi-contract* of another, be obliged towards him."

It could be plausibly argued that both these articles seem to contemplate merely the capacity or incapacity, if not to contract, at all events to be bound. This is the first and obvious meaning, no doubt. Pothier's language in the example he gives is this: No. 128 Ob.: "Il est clair que les fous, les insensés, les enfans, ne sont pas capables de contracter les obligations qui naissent des délits ou des quasi délits, ni de contracter par eux-mêmes celles qui naissent des

contrats, puis qu'ils ne sont pas capables de consentement, sans lequel, il ne peut y avoir ni convention, ni délit ou quasi délit: mais ils sont capables de contracter toutes les obligations qui se contractent sans le fait de la personne qui la contracte. Par exemple, si quelqu'un a géré utilement les affaires d'un fou, d'un insensé, d'un enfant, cet enfant, cet insensé, ce fou contracte l'obligation de rembourser cette personne de ce qu'il lui en a coûté pour cette gestion."

Pothier's language is here admittedly inaccurate. The idiot cannot strictly contract an *obligation*, because consent is necessary. He can come under a liability—an *engagement* as some commentators call it, because the reason given in Pothier is that the *quasi contract* results from a fact, and not from a consent, and so the infant or the idiot could be bound though they had given no consent; but, it is said, they must have had an existence of some sort—incomplete if you will (undeveloped, perhaps, is the scientific word). Here it is contended that the undeveloped corporation which used the plaintiffs to obtain a state of full development for them were without power to consent, and not only without power to give any kind of consent, but without any form or kind of existence, inchoate or otherwise. Now, though the law, in its terms, and Pothier in his examples, says the incapacity of the idiot will not exclude obligation under a *quasi contract*, is that the whole extent of their meaning? The law makes the *quasi contract* to spring not from capacity or completeness of power, but from a fact—a benefit; therefore if the defendant has power to be benefited it would seem it ought to be bound. There is a special allegation in the declaration, and it is also repeated in the special answer to the exception, and I think it has great force, that the defendant has availed itself of the Act of Parliament got by the plaintiffs' professional exertions; so that this would change the aspect of the question; and it would no longer be whether a *quasi contract* can oblige an incapacitated person, or even an incompletely existing or organized body of persons; but whether the assumption, adoption and use by an existing person or body of persons of what was got for them by the services of another, renders him or them liable for the price or value of those services. Here there was, indeed, no body of persons having a com-

plete corporate existence at the time the services were rendered, and possibly there may have been no *quasi* contract to bind the non-incorporated party at that time; though there may be now to bind an existing party who could not then consent, but has since received the benefit. But call it what you please, it is a liability which may be assumed at all events: and which may result as well from that assumption as from an original contract or *quasi* contract. In England, in equity, a corporation is held liable for the acts of those who procured its incorporation, even to the extent of agreements which such persons may have made with third parties. Surely then, a corporation is bound in some form towards those to whom it owes its very existence, if not by the legal fiction of the *quasi* contract, at least by the fact of its own assumption and acceptance and use of the powers got for them by the labors of the plaintiffs. I am by no means clear that there was not here a *quasi* contract under the authority of Pothier's examples. The liability attaches in those cases because the parties could not create it for themselves. What reasoning separates those instances from the present one? for even a vacant succession can be bound by a *quasi* contract. In the 1st vol. of the English Railway and Canal Cases, p. 129, there is one reported of *Edwards et al. v. The Grand Junction Railway Co.* The point was the liability of the company, after incorporation, for what had been agreed to on their behalf before incorporation. I think this is a much stronger case for the plaintiffs than that one was; but even there, the language of the Vice-Chancellor (and his judgment was confirmed in appeal) was very plain. He said:—"I think that where parties are going before Parliament for the purpose of being incorporated, a door would be open to great frauds if bargains made by persons acting as their agents, when they are in a scattered and individual state, were not binding on the company when incorporated." That, as I have said, was not the point that comes up here; but it was a stronger point for the corporation; yet they were held to bargains made while they were in "a scattered and individual state," and I see no reason why the present defendants should not also be so held.

As to the existence then of a *quasi*-contract in this case, though there may possibly be some

doubt, I incline to say there was one. I see some authors in discussing this question prefer the term "*engagement*" in some cases where the will of the parties is no element, and where the obligation arises from a mere fact (see Laurent, vol. 20, art. 305 to 309). In one place this writer asks: "Pourquoi la loi fait-elle naître des obligations d'un fait? nous avons déjà indiqué le motif général; c'est ou l'utilité des parties intéressées, ce qui est aussi un intérêt général, ou une considération d'équité." Apart, however, from the question of *quasi*-contract, the obligation of the defendants is supported by the principle I have before adverted to, that they have taken and used what was got by the plaintiffs' services, and they cannot make profit at their expense.

Judgment for plaintiff.

De Bellefeuille & Bonin for plaintiffs.

Alphonse Ouimet for defendant.

SUPERIOR COURT.

MONTREAL, Jan. 15, 1881.

Before PAPINEAU, J.

NEVEU v. RABEAU, and NEVEU, T. S.

Contestation of declaration of garnishee—C. C. P.
862, 864.

The declaration of a garnishee cannot be contested without leave of the Court, but such leave may be granted even after the delays have expired, on payment of costs.

Motion by T. S., that contestation of declaration of T. S. filed in the cause by plaintiff be rejected, because not filed within the delays, and leave of the Court not having been obtained.

PAPINEAU, J. La présente cause est accompagnée de saisie-arrêt avant jugement. Le tiers saisi a fait une déclaration. Le jugement a été prononcé sur la demande principale. Un peu plus de 8 jours après le jugement, le demandeur, sans la permission de la cour, a produit une contestation de la déclaration, et l'a signifiée au T. S. en lui donnant avis d'y répondre dans les délais voulus par la loi. Le tiers saisi fait motion pour rejeter cette contestation. La motion est bien fondée en vertu des Arts. 862 et 864 C. P. C., et elle est accordée. Si le demandeur avait demandé permission de laisser sa contestation dans le dossier en payant les frais de la motion, la cour

l'eût accordée, parceque dans une autre cause cette permission a été accordée plus d'un an après jugement, et même cette permission a déjà été accordée après jugement semblable à celui présentement rendu.

Ge frion, Rinfret, Dorion & Laviolette for T. S.
R. & L. Laflamme for plaintiff contesting.

SUPERIOR COURT.

MONTREAL, JAN. 31, 1881.

Before PAPINEAU, J.

McLAREN et al. v. KIRKWOOD, and BROOKS, petr.
for writ of possession.

Sheriff's sale—Right of Purchaser to expel the Lessee.

The petitioner Brooke, had purchased at sheriff's sale an immovable situate in St. Antoine ward, Montreal. Not being able to obtain delivery of the property, he demanded it of the sheriff (under C. C. P. 712), and the sheriff having given a certificate of the refusal to deliver, the petitioner now asked for a writ of possession. This petition was served upon the defendant, and also upon William Blackman, the lessee in possession.

The lessee, Blackman, opposed the granting of the order, on the ground that he had leased the property under a notarial lease, which being continued by *tacite reconduction* for one year, would not expire until 30th April, 1881; that the sheriff's sale had not the effect of terminating the lease, and he had a right to remain in possession until 1st May next.

The Court granted the petition, referring, among other articles, to C.C. 1663: "The lessee cannot, by reason of the alienation of the thing leased, be expelled before the expiration of the lease, by a person who becomes owner of the thing leased under a title derived from the lessor," &c. C.C. 2128 says: "The lease of an immovable for a period exceeding one year cannot be invoked against a subsequent purchaser unless it has been registered." These articles, it was held, did not apply to a sale by a sheriff. The lessee's right is personal and is to be exercised against the lessor, and when the latter ceases to have any right in the property, the lessee's right also comes to an end. The lessee no doubt is exposed to injury where the lessor becomes insolvent, as is usually the case when his property is sold by sheriff's sale, but this

inconvenience is no ground for setting aside the law. Petition granted.

Bethune & Bethune, for petitioner.

Kerr, Carter & McGibbon, for the contestant Blackman.

SUPERIOR COURT.

MONTREAL, JAN. 31, 1881.

Before JOHNSON, J.

GRAND TRUNK RAILWAY CO. v. CURRIE.

THE SAME v. HALL et al.

Liability of purchaser to pay interest on purchase money when the property is mortgaged for a larger sum than the price due.

JOHNSON, J. The question raised in these two cases is whether the purchaser of real estate is bound to pay interest on his purchase money, when the property is mortgaged for a larger sum than the price due.

Art. 1535, C. C., says:—"If the buyer be disturbed in his possession, or have just cause to fear that he will be disturbed by any action hypothecary or in revendication, he may delay the payment of the price until the seller causes such disturbance to cease, or gives security; unless there is a stipulation to the contrary."

Here there is no stipulation to the contrary, therefore the purchaser is entitled to delay payment of the price until the plaintiff causes the mortgages to be erased. But the plaintiffs do not claim the purchase money. They claim payment of the interest thereon; and the question is whether a purchaser may delay payment of the interest as well as of the price itself. This is no new question. In France, whence we borrowed our article 1535, it seems to suffer no difficulty. Here there have been various decisions of more or less authority in various cases, but still the main principle seems never to have been shaken except in the case of *Dorion v. Hyde*, and though I myself sat in that case, I must say that in the light of subsequent decisions, I think it was wrong. That case occurred fourteen years ago, and the Judges who sat were the late Judge Caron, Judge Duval, Judge Drummond, and myself as Judge *ad hoc*. Certainly the reasoning of Judge Caron was very convincing then, but, as Judge Dorion said in *Hogan v. Bernier*, the reasoning is not supported by authority, and is opposed to authority.

It was said that the case of *Dorion v. Hyde* had never been overruled. This is a mistake; not to speak of *Hogan v. Bernier*, in which it was overruled admittedly, and, to my mind, with commanding ability and decisive reason and authority, by one of the ablest judicial mind, that ever adorned this Bench;—a judgment, too, which was subsequently confirmed unanimously in review (*Hogan v. Bernier*, 21 L. C. J. p. 101): besides that case, I say, *Dorion v. Hyde* was overruled in a case that was not mentioned at the Bar;—the case of *Parker v. Felton* (21 L. C. J., p. 253), where, though the action was different from this, it was clearly held that the balance of the purchase money itself is the only amount for which the purchaser can claim security. In the case of the *G. T. R. Co. v. Martin*, decided by Judge Rainville in the C. C. on the 18th of March, 1879, the rule now contended for by the plaintiff was maintained. In four other cases of the same plaintiffs v. McGuire, Walker, Slater and Jones, on the 13th September, 1880, Mr. Justice McKay held the same thing. As to the reasoning on the subject, it is, as I have said, exhausted in the case of *Hogan v. Bernier*. The whole thing is comprised in two or three plain principles. In the first place the law gives the purchaser no right to get back again any part of the price he may have already paid, on account of apprehended trouble. It simply gives him the faculty of delaying payment of the price. If he choose to pay trusting to the seller's solvency, there is an end of the question. He has not chosen to use a faculty given to him for his protection; and there is no authority to extend it to other cases. We must remember that by the old French law, the purchaser could not refuse to pay on account of mortgages in such a case as the present. Of course if there was a warranty of *franc et quitte*, and the property turned out to be mortgaged, the purchaser could complain that he had been deceived, and he could break the sale; but it was different where the seller only covenanted to hold harmless. As long as the purchaser was not troubled, he could not refuse to pay, even if he was sure that sooner or later he would have to pay the mortgages. He had to wait till the trouble came, and then he could call upon his vendor to make it cease, or indemnify him. The obligation of the seller was simply that he would maintain the purchaser

in quiet possession. (Pothier, *Vente* No. 1, *Talbot v. Beliveau*, 4 Quebec L. Rep., p. 104.) In the present case, and in the present state of the law, and the decisions on this subject, I am not justified in treating it otherwise than settled by authority in favor of the plaintiffs' contention. I do not refer, *in extenso*, to all the cases; but there was the case of *McDonnell & Goundry*, which is a very important one. It was different in the main object of the action from this, and depended on an express stipulation, and other facts not presented here; but in giving judgment, the Chief Justice said (22 L.C.J., p. 222): "The appellant is entitled to retain the principal; but not the interest, which represents the rents, issues and profits," and his Honor cited *Sirey*, *Dalloz*, *Duranton* and *Troplong*, which have been cited in the present case. There is an earlier case also; *Dinning v. Douglas*, 9 L. C. Rep., p. 310. In that case it was held by Chief Justice Lafontaine, Aylwin, Duval and Meredith, JJ., that "a purchaser enjoying the property purchased, and withholding the purchase money until his vendor shall have complied with a judgment ordering him to remove certain oppositions, is bound to pay his vendor the interest, as it becomes due, even though the latter may have failed to remove the opposition in compliance with the judgments against him." The interest then in both these cases is due, and it only remains to see how much it is. In the case of *Currie* receipts lost at fire at Point St. Charles reduce the amount to \$67.50; in the other case judgment for the amount demanded, \$273.71.

Duhamel & Co. for plaintiffs.

Bethune & Bethune for defendant *Currie*.

Davidson & Cushing for defendants *Hall et al.*

SUPERIOR COURT.

MONTREAL, JAN. 31, 1881.

Before TORRANCE, J.

LEROUX v. VICTOR HUDON COTTON CO.

Damages—Negligence—Personal Injuries.

TORRANCE, J. This was an action of damages for personal injuries. On the 3rd April last, plaintiff had entered the yard of the company, and was proceeding to the office in search of employment, when an empty barrel, weighing some 60 or 70 pounds, was thrown out of an upper window of the factory, and struck him on

the body, throwing him down and breaking his left shoulder blade and his sixth rib. He was in bed three weeks under the care of Dr. Demers. The demand is for \$5,000. The defendants do not admit any liability, but tender \$300 besides costs.

There can be no doubt as to the liability of the defendants. The plaintiff was lawfully on the ground, could not be regarded as a trespasser, and it was gross carelessness on the part of the foreman, to throw down the barrel where it could strike a passer-by. It is true, he says, he looked up and down before throwing down the barrel, but it is evident that he looked without seeing, for the man was there and was knocked down. The Court has to estimate these damages. There is the doctor's bill, \$30; there is loss of time while the man was in bed and unable to work, and there is the question as to whether the man has been permanently injured and his ability to gain a livelihood has been lessened. The opinions of the doctors differ on this point. The medical testimony for the plaintiff is to the effect that in his calling of a carpenter his ability has been lessened; but, on the other hand, evidence as reliable has been adduced by the defendants, to the effect that the accident has left behind it no evil effects. The Court allows in all the sum of \$500. In its estimate, it has had the benefit of the opinion of Dr. Hingston, whom it appointed to make an examination of the person of plaintiff. *Journal du Palais*, A.D. 1872, p. 558. The amount awarded is made up as follows:—Doctor's bill, \$30; loss of wages for the first three months, \$80; for the second 3 months, \$60; for the third three months, \$40; for the fourth quarter, \$20; for the second year, \$60; for the third year, \$30; and the balance of \$180 is exemplary damages. This amount is not liable to seizure, and the plea is overruled.

E. U. Piché, for plaintiff.

Béique & Co. for defendant.

CIRCUIT COURT.

[In Ejectment.]

MONTREAL, NOV. 30, 1880.

Before JETTE, J.

THE LIFE ASSOCIATION OF SCOTLAND V. DOWNIE.

Leased premises used for purposes of prostitution—

Lease rescinded.

By deed of lease passed March 29, 1880, be-

fore Levy, N.P., the plaintiffs leased to defendant, for the term of one year from 1st May last, the two upper flats of the building known as the Life Association of Scotland building, situated at the corner of St. James street and Place d'Armes Hill, in the city of Montreal.

On the 20th Nov. 1880, the plaintiffs instituted an action to rescind the lease. The declaration alleged, "that for several months past the defendant had permitted the leased premises to be, by day and night, the resort of loose, idle and disorderly persons, and to be used for purposes of prostitution, to the great injury of the plaintiffs, and to the scandal of all peaceable and respectable persons residing in the vicinity." The declaration concluded by praying for the rescission of the deed and the ejectment of the defendant from the premises.

The Court gave judgment according to the conclusions of the *demande*.

Ritchie & Ritchie for plaintiffs.

D. Major for defendant.

COMMUNICATIONS.

CAPIAS.

AU RÉDACTEUR DU LEGAL NEWS :

MONSIEUR,—Dans le district de Québec, il y a divergence d'opinions sur l'application de l'article 824 du code de procédure civile, qui permet au défendeur emprisonné sur *capias* d'obtenir son élargissement en fournissant deux cautions qu'il ne laissera pas la Province du Canada.

Un juge a prétendu que cet article 824 ne s'appliquait qu'au cas où l'affidavit dirait que le défendeur était sur le point de quitter la Province du Canada; et si l'affidavit alléguait seulement que le défendeur a caché, ou soustrait, ou est sur le point de cacher ou soustraire ses biens et effets (sans mentionner qu'il est sur le point de quitter la Province du Canada), le défendeur ne pourrait pas alors être élargi sous le cautionnement mentionné en l'article 824.

Bien des membres du Barreau de Québec vous seraient obligés si vous aviez la complaisance de mentionner dans le "Legal News" ce qui se pratique à Montréal à ce sujet, et les raisons de cette pratique.

January 23, 1881.

C.

[Perhaps some of our readers may be able to state whether they have heard of such a distinction.]

RECENT ONTARIO DECISIONS.

Insolvent Act of 1875—Secured creditor.—A creditor, who holds security from the insolvent at the time of his insolvency, cannot realize on the security and rank on the estate for the balance of the debt, as the assignee has thus no opportunity of taking the security at a valuation for the benefit of the creditors.—*In re Beatty*, (Court of Appeal, Dec. 20, 1880.)

Attorney and Client—Principal and Agent.—W. & Co., attorneys in the Province of Quebec, requested the defendant, an attorney in the Province of Ontario, to take proceedings to collect the amount due on a promissory note, of which certain clients of theirs, living in the Province of Quebec, were the holders. The defendant issued the writ in the name of B. & Co., and endorsed thereon his own name as attorney. He, however, never had any communication with them, treating W. & Co. as his principals, and he credited them with the amount of the note when collected. *Held*, that the plaintiff, who was assignee of B. & Co., was entitled to collect the amount of the judgment so recovered from the defendant; the rule that the town agent of a country principal is not responsible to a client of the latter not being applicable, as it was held that W. & Co. were the plaintiff's agents to retain the defendant to act as their attorney, and the relation of attorney and client was, therefore, created between them.—*Ross v. Fitch* (Ct. of App., Dec. 20, 1880.)

Promissory Note—Double Stamping.—The plaintiff objected to purchase a note from one C., on the ground that it was insufficiently stamped, whereupon C. affixed double stamps and then transferred it to the plaintiff, who did not notice that C. had omitted to cancel the stamps, until some time afterwards, when his attorney mentioned it to him, when he at once double stamped it, and cancelled the stamps in accordance with 42 Vict. c. 17, s. 13. *Held*, that the evidence showed that the plaintiff took the note in the full belief that it had been properly double-stamped by C., who was, at the time, the holder, and that he was entitled to cure the deficit, by double-stamping.—*Trout v. Moulton* (Ct. of App., Dec. 20, 1880.)

Fraud—Principal and Agent.—The plaintiff applied to the defendants through W., their agent, for a loan, and requested them, by his

application, to send the money "by cheque, addressed to W." In accordance with their custom to make their cheques payable to their agent and the borrower, to insure the receipt of the money by the latter, the defendants sent W. a cheque payable to the order of himself and the plaintiff. W. obtained the plaintiff's endorsement to the cheque, drew the money, and absconded. The plaintiff swore that he did not know that the paper he signed was a cheque, and there was no evidence to show that he had dealt with W. in any other character than as the defendant's agent, through whose hands he expected to receive the money. *Held*, that W's duty to the plaintiff was to endorse the cheque to him, or to see that the money reached his hands, and that the defendants, who had put it into his power to commit the fraud, must bear the loss occasioned by their agent.—*Finn v. Dominion Savings & Investment Co.* (Ct. of App., Dec. 27, 1880.)

Promissory Note—Defence of Forgery—Expert Evidence—New Trial refused.—In an action, by an innocent holder against the endorser of a promissory note, the defendant pleaded that the alleged endorsements were forgeries. On the first trial the jury disagreed, and on the second found for the plaintiff. No expert was called at either trial, and the Court refused a new trial to enable such evidence to be given.—*Moser v. Snarr* (Q.B., Nov. 22, 1880.)

GENERAL NOTES.

A letter, printed in some recently published memoirs, contains the following amusing example of attorneys' charges for election work :—"A scamp of an attorney, who thrust himself into some trifling employment in Sir Francis Burdett's celebrated contest for Middlesex, on sending him his bill, after charging for a journey to Acton, and another to Ealing, &c, closed as follows :—"To extraordinary mental anxiety on your account, £500."

The *Albany Law Journal* unintentionally misquotes us on the subject of Clerical Interference in Elections. We did not say "that a priest may properly tell his "people from the pulpit how they should vote;" but, stating what had been held by the Courts, that "a "clergyman may, if he thinks proper, counsel his flock, "privately, or even from the pulpit, to vote as he "would have them vote;" that is, that the law does not prohibit him from going to this extent, and that this *per se* will not constitute a ground in law for annulling the election.

The Legal News.

VOL. IV. FEBRUARY 12, 1881. No. 7.

JUDICIAL PENSIONS.

A return, laid before the House of Commons, embraces several statements on the subject of pensions granted to judges in the several provinces. The first shows the number of judgeships in each province on its union with Canada, the incumbents of which were entitled, in certain events, to retiring allowances. In the Province of Quebec there were 24, viz. 5 Q. B., 18 S. C., and 1 Vice-Admiralty. In the Province of Ontario there were 9, viz. 3 Q. B., 3 C. P., and 3 Chancery. At that date (A. D. 1867) there was in Lower Canada no statute specifying the pensions or the judges entitled to receive them; but by Statute, a lump sum was placed at the disposal of the Government for judicial pensions. The number of judges, at confederation, actually in receipt of retiring allowances was very small: only two in Quebec, and one in Ontario; the total charge per annum for the former being \$4,799.96, and for the latter \$3,333.33.

The increase since confederation, both in the number entitled to, and in the number actually in receipt of, retiring allowances, has been very striking. In the Province of Quebec there was a judge added to the Superior Court in 1869, a second in 1871, and 6 more in 1872, bringing the number of judges entitled, in certain events, to retiring allowances, up to 32. In Ontario the increase is still more marked. In 1872, 49 judges and junior judges of the County Court became entitled under 36 Vict. c. 31. In 1873 the Court of Appeal was created, with four new judges, and the total for Ontario was brought up to 61, at which figure it has remained. In 1875, the enactment of the Supreme Court Act added 6 judges of the Supreme and Exchequer Courts for the Dominion. In Nova Scotia there are now 15 judges entitled, in New Brunswick 12, in British Columbia 9, in Prince Edward Island 6, and in Manitoba 3. It may also be remarked that in 1880, by Act of the Quebec Legislature, one judge has been added to the Court of Queen's

Bench and one to the Superior Court, but the appointments have not yet been made.

The increase in the actual charge upon the Treasury has also been very large, and although the number of judicial officers entitled in Ontario is nearly double the number entitled in Quebec we find the actual charge many times greater in the latter Province. In Ontario the charge decreased until in 1876 it vanished altogether. In 1878 it re-appeared, and now stands at \$3,200. In Quebec the increase has been almost continuous. In 1868 the whole amount was \$7,068.05; in 1871 it was \$9,201.37; in 1872, \$11,068.01; in 1874, \$19,566.57; in 1875, \$21,899.90; in 1876, \$24,566.56; in 1877, \$25,766.56; and in 1879 and 1880, \$28,332.22. The total number in Ontario is 2 against 10 in Quebec. It is apparent, therefore, that a much larger proportion of Ontario judges die in harness than of their Quebec brethren. This fact has been attributed in some quarters to the less agreeable position of the latter, many of the Superior Court judges being obliged to reside in country districts, and the duty of holding the Circuit Court for the decision of petty causes being imposed upon them.

THE BRIEF TRADE.

Brief-selling is an established trade in the United States. A company exists, under the name of the "New York Brief Company," which advertises its readiness to supply briefs "skillfully and logically prepared by able and experienced lawyers," and "satisfaction and *absolute secrecy*" are guaranteed. These briefs are to be "submitted without argument," and are intended, apparently, to supersede oral arguments. This seems to promise a solution of the problem which has puzzled sundry ambitious persons for centuries—How to practice law without Brains. We shall soon see a new item in the market reports, and briefs will be quoted "dull," "sluggish," or "lively" as the case may be.

MASTER AND SERVANT.

A decision was recently given by the Supreme Court of Austria, which illustrates the law of that country on the subject of the employer's liability for injuries to employees resulting from defective machinery. The North German Ice Works are engaged in the ice business at

Berlin, and have ice-houses on the bank of the Danube, near Vienna. The ice, after being cut, is elevated by crane and pulley to the storehouse, and slides down inside. On the downward slide the ice moves by its own weight, and with increasing velocity, its course being directed by laborers stationed along the sides to keep the blocks on the track. Popp, the injured party, was one of those so engaged. But a large cake of over a hundred weight jumped the track, and though Popp sprang to one side, he was not quick enough, and was thrown down and his left leg broken. He claimed damages, but the sympathies of the company were apparently as cold as the article they deal in. Mr. Popp, however, gained the day—the Court holding that it was the duty of the company to provide railings or beams along the sides of the slide to keep the ice from falling off,—and after the company had dragged the plaintiff through three Courts, the judgment in his favor has been affirmed finally by the Imperial Supreme Court of Austria.

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, JAN. 31, 1881.

JOHNSON, RAINVILLE, PAPINEAU, JJ.

[From S. C., Montreal.

OSBORNE et al. v. PAQUETTE.

Evidence—Certificate of Prothonotary not sufficient proof of execution of deed of composition between Insolvent and his creditors.

The judgment inscribed in Review was rendered by the Superior Court, Montreal, Jetté, J., May 31, 1880.

JOHNSON, J. On the 15th April, 1879, the defendant was arrested under a *capias ad respondendum* at the suit of the plaintiffs, and went to prison in default of bail. On the 23rd of June he gave bail under article 825 C. P., that he would surrender to the sheriff when required to do so by an order of the Court, within a month of the service of such order on him or on his sureties—in default, the sureties to be liable, &c. After giving this bond, he was liberated, and on the 17th of September judgment was given for the debt, interest and costs sued for, and also maintaining the *capias*. On the 13th

of February the plaintiff moved that as the defendant had not made an abandonment of his property under Art. 766, he should be imprisoned, and also that the Court should give the order contemplated by the bail bond—to surrender within a month after it should be served on him.

The first part of the motion was unfounded, and seems to have been unnoticed. The second part asking for the order to surrender was answered, not by contesting the right that was claimed by the plaintiff to have this order, but by in effect alleging a reason why the right could not in this case be exercised as asked; that is to say, he advanced a fact or an allegation of facts; and he produced as his only proof of them a certificate of the Prothonotary. He said: "You cannot ask for this order, because when you get it, it will be of no use, inasmuch as I have a deed of composition with my creditors." Whether this would be a complete answer, and whether a composition not confirmed by the Court would discharge the debtor from liability to this order, we need not discuss. The only point now is whether the certificate of the Prothonotary is a complete proof of the execution of such a deed between these parties; and it seems clear that it cannot be so held, and still less is it a proof of the facts of the composition. We see, however, that this man may have a right; and yet we see also that the inscribing party here is entitled to succeed completely, because this right has not been established. We, therefore, render the judgment that might have been given below, and we order that the motion be answered in writing within eight days, and we discharge the inscription, and condemn the defendant to pay the costs of review.

Inscription discharged.

L. N. Benjamin for plaintiffs.

Doutre & Joseph for defendant.

COURT OF REVIEW.

MONTREAL, JAN. 31, 1881.

JOHNSON, TORRANCE, JETTÉ, JJ.

[From S. C., Montreal.

MCALLEN v. ASHEY, & ASHRY, Petr.

Capias—Affidavit—Existence of debt at time of alleged sequestration.

The judgment under Review was rendered by

the Superior Court, Montreal, Rainville, J., Jan. 15, 1881.

JOHNSON, J. We are asked by the plaintiff to review a judgment ordering the liberation of the defendant who was held under a *capias*. The insufficiency of the affidavit was made the subject of a petition, and what the defendant objected to was substantially that it did not allege the secretion to have taken place since the indebtedness. It said that in February, 1879, there had been a conversation between the parties, and that since that time the defendant has secreted. The debt was contracted some months after that. Therefore, it is not expressly said that there was a debt at the moment of secretion. The affidavit is wanting in precision, and is therefore technically deficient. The judge who heard the case granted the petition, and subsequently suspended the discharge because this review was taken. The affidavit may, perhaps, be construed to mean all that the law requires; but we think where a party has been liberated, or at least the principle of his liberation has been already granted, we should not, as it were, send him back by resorting to construction; but rather take the strict view of the law, and maintain the judgment. We therefore order his discharge now.

Judgment confirmed.

Macmaster & Co. for plaintiff.

Davidson, Monk & Cross for defendant.

COURT OF REVIEW.

MONTREAL, JAN. 31, 1881.

TORRANCE, RAINVILLE, LAFRAMBOISE, JJ.

[From S. C., Montreal.

STAFFORD et al., insolvents, JOSEPH, claimant, and SMITH et al., contesting.

Insolvent estate—Landlord's claim for unexpired lease—Estimate of value where right to terminate lease was stipulated in favor of the lessee.

The judgment under Review was rendered by the Superior Court, Montreal, Mackay, J., July 7, 1880.

TORRANCE, J. This was an appeal from a judgment settling the amount of the claim of a landlord against the insolvent estate of his tenants. Two points were especially complained of by the landlord. 1. That the judgment only

allowed him \$800 damages for unexpired lease, in place of \$4,500 for six years claimed by him. The evidence shows that the lease gave the tenants the right to terminate the lease on the 1st day of May, 1880, by giving six months' previous notice. The insolvency took place in 1879, and the lease was terminated by the creditors on the 1st of May, 1879, from which time the landlord recovered possession, and the Court, considering the fact that the lease might have terminated on the 1st of May, 1880, has only allowed one year's damages, namely, \$800. We do not see error in this estimate of damages. 2. The other point to which attention has been called by the claimant is that the judgment orders the claimant to tender back to the assignee an iron staircase at such place in the city as the assignee might in eight days indicate. The reason of this order was that the claimant objected to the assignee removing the staircase in the previous year, on the ground that the tenant had the use of it and could not be disturbed. We see nothing unreasonable in this order, and on the whole we confirm the judgment. The apportionment of costs is also complained of, but we think as to costs that the discretion of the Court was reasonably exercised.

LAFRAMBOISE, J., differed from the majority.

Judgment confirmed.

C. S. Burroughs for claimant.

Davidson, Monk & Cross for contestants.

COURT OF REVIEW.

MONTREAL, JAN. 31, 1881.

SICOTTE, RAINVILLE, JETTÉ, JJ.

[From S. C., Montreal.

EVANS v. FRASER.

Libel in way of Profession—Damages.

The judgment under Review was rendered by the Superior Court, Montreal, Johnson, J., May 31, 1880, as follows:

When this case was submitted the other day there was a motion made to reopen the defendant's enquête with a view of establishing omissions in the accounts of the estate Fraser. There are affidavits on both sides; and I think the affidavit produced on the plaintiff's behalf is conclusive against granting the application. I need not indeed go so far as that; for it is no

ground for reopening evidence that you have got more to offer, unless it has been discovered since the case was closed, or was unknown at the time. Motion to reopen enquête dismissed.

As to the merits of the case, it is an action by a professional accountant against a person who apparently conceives it to be his business not only to enquire into, but to publicly stigmatize the conduct of private persons who are employed by the executors or trustees appointed under the will of the late Hugh Fraser; and under that impression, or that illusion, he has addressed a letter to the chairman of an insurance company, and afterwards sent a copy of it to the Mayor of the city, who read it to the Council; and he has also had it published in the newspapers.

This letter was a very long affair, and perhaps I had better not read it all; but its substance was that the late Hugh Fraser had died leaving an estate worth about \$500,000, of which the writer mentioned the component assets; and that Mr. John Henry Menzies, as agent of the executors and trustees, and in the names of Menzies & Co. and Moore & Co., having misconducted certain duties with which he had been charged in connection with the accounts, Messrs. Riddell & Evans (the plaintiff) had been called in to examine matters and to make a balance sheet, which they did, and in which the whole indebtedness of Menzies & Co. and of Moore & Co., and of Mr. Menzies individually, was suppressed. It went on further to say that, whether Mr. Menzies or Messrs. Riddell & Evans were the authors of the balance sheet, it was false and fraudulent; and in fact he plainly charged Mr. Menzies with false and fraudulent conduct, and the plaintiff just as plainly with aiding and abetting it; and the plaintiff therefore brought his action and laid his damages at \$5,000.

The defendant pleaded the whole story of the bequest for the Fraser Institute, the incorporation of it, and that as a relative of the testator, and as a citizen of Montreal, he was interested in seeing this benevolence carried out. That in writing the letter he had had no intention of injuring the plaintiff, but had merely wished to point out certain irregularities in Mr. Menzies' system of bookkeeping, which he held the plaintiff was bound to have detected when he was called upon to examine

the accounts; that as to the charge of suppression, he only meant to say the plaintiff had been unskilful and negligent, and that he had a right to say what he did in the letter, and he offered to prove the truth of it.

The plaintiff's answer to all this was a general answer in fact and in law, and, to my surprise, at the trial evidence was offered—was not objected to, and was, of course, taken—as to the truth of a variety of matters in these accounts, justifying the imputations that the defendant had made in this letter. The plaintiff may have wished probably to give Mr. Fraser every opportunity of showing that the charges were true; but that would not alter the state of the issue. There is nothing pleaded here as to the non-publication, or as to its being a privileged communication, (which it possibly was intended to be at the outset): but the thing is put on the ground of right, and the publication was admitted by the defendant himself. Now, though Mr. Evans was spoken of throughout as being a public accountant, that cannot mean that he keeps the public accounts, or is in any sense a public officer; he is one of a private firm of persons skilled in accounts, and happened to be employed by the trustees under a will benefiting a public institution: that is all. The plaintiff had no more right to impute to him, and to publish of him even that he was unskilful and negligent in his profession, than he would have had to publish that the doctors attending the benefactor of this institution in his last illness had killed their patient. The public benefaction contemplated by the late Mr. Fraser does not turn into public characters all the accountants, attorneys, collectors, scriveners or others whom his trustees may employ; and any of these would justly think it very hard that the Mayor of Montreal or the newspapers should be asked to publish that they had shown negligence or incapacity. But much more than negligence and incapacity are evidently imputed in this letter, and it is not the Governors of this institute, nor the trustees, nor the executors that are complained of, but merely a private person employed by the trustees. As matter of right, therefore, if it is meant that the plaintiff was a public character, amenable to public criticism, as long as it is true and fair, there is nothing to justify this evidence at all. As affecting the question of damages, however,

—though not the right of action,—the degree of truth, as showing the malice that may be found in the thing published, may be considered. As to this, however, this charge of suppression and connivance brought against Mr. Evans, though it was pressed with the greatest pertinacity, it resulted in absolutely nothing but the triumph of Mr. Evans. It became a conflict between counsel acting under instructions, and with his client by his side evidently actuated by the strongest feeling, and a skilled and cool accountant who explained everything as fast as it was brought forward. But what, if all this bewildering evidence should show that what Mr. Fraser wrote was true? Has Mr. Fraser the right to impute publicly to Mr. Evans, a professional accountant, that he has been guilty of suppression and connivance? Clearly not, unless the laws and liberties of the land have been changed: unless the subjects of the Queen of England, instead of having their alleged offences discussed in her Courts of Justice, are obliged to submit to what has been called "trial by newspaper." It is evident to me that Mr. Fraser is acting under strong feeling. He imagines himself wronged, which may be true, or illusory,—I have nothing to do with that; it cannot affect the rights of Mr. Evans, however it may alleviate the idea of malice in Mr. Fraser. But granting all this, supposing Mr. Fraser to be perfectly honest, who is to pay for Mr. Fraser's honest mistakes? It is said no damage is proved. That is not quite correct, however; there is no special damage proved, nor is any even alleged; but the *injure* is there, and it is for the Court to adjudge and fix the damage. Mr. Evans proved by the most respectable witnesses a very high character and a most responsible position; it was proved, indeed, by Mr. Workman that these gentlemen, Messrs. Riddell & Evans, were selected for this task on account of their character and fitness. It is not likely that the amount of money is the thing principally sought by this action: it is the vindication of character; and that has been completely accomplished, and the defendant has been proved to have done a wrong, which under all the circumstances will probably not affect Mr. Evans in the slightest degree. On the other hand, there is no evidence of Mr. Fraser's ability to pay heavy damages, and I gather, indeed, that such are not asked; I give

enough to carry full costs; not meaning, however, to say that Mr. Fraser's conduct was in any degree justified; but merely that it is looked at in the most lenient way in my power. Judgment for \$50 and full costs.

JETTE, J., rendered the judgment in Review which confirmed the above in all respects.

Macmaster & Co. for plaintiff.

R. & L. Laflamme for defendant.

SUPERIOR COURT.

MONTREAL, Jan. 31, 1881.

Before JOHNSON, J.

OUIMET V. BEAUCHEMIN.

Pleading—Inconsistent allegations.

JOHNSON, J. By an additional plea to a *demande supplétoire* in an action for rent the defendant has alleged that he only owes \$3 a month, and that the occupation of the place is not even worth so much as that. The plaintiff moves to compel the defendant to choose between these allegations as inconsistent. They do not seem to the Court absolutely inconsistent. A man may owe (as having promised to pay) more than is actually due. It is surplussage of course; but if we begin to deal at the present day with the surplussage of pleadings in this Court, I am afraid we shall have hard work. It seems in the present case merely that the defendant wants to boast what a fine fellow he is by implying that he is willing to give more than he owes. The motion is dismissed with costs.

Motion rejected.

F. D. Monk for plaintiff.

Taillon for defendant.

SUPERIOR COURT.

MONTREAL, Jan. 31, 1881.

Before JOHNSON, J.

BERNARD V. GAUDRY.

Action for Penalty—Joint and Several Condemnation.

JOHNSON, J. This is a *qui tam* action brought under c. 65 of the Consolidated Statutes of L. C., for omission to register a partnership. The declaration is excepted to upon a great many grounds of form. The first is that under the Stat. 27-28 Vict., c. 43, the affidavit which

is required in these cases to prevent collusion is not conformable in all respects to the requirements of the 1st section of the statute; but I have compared the affidavit, sentence by sentence, with the 1st section, and I find no inconformity whatever, even verbal. The second objection, though a very narrow and simple one, has more weight. It is said there is no affidavit *at all*, that is, that the paper called an affidavit is not sworn. There is a form of jurat, but of course to have validity it must be certain as to date, without which it would be impossible to visit the deponent with the penalties of perjury. The words are: 'Assermenté à Montréal ce onze Novembre,' &c. (*dix* erased.) There is nothing to authenticate the word 'onze,' nothing to authenticate the exclusion of the word 'dix.' If this were, there might be a serious objection; but it is not so. The word 'dix' is one of two words accounted for as being erased. Then the conclusion is for a joint and several condemnation for a penalty. This appeared to me at first sight objectionable, but I see the statute expressly authorizes it in sec. 1 par. 4. 'Each and every member shall be liable,' &c. The last objection to the form is the insufficiency of service and return, the person making it not saying he is a bailiff, nor where residing, as the article requires; but he signs H. C. S., and he says he returns sous serment d'office, and this appears sufficient. There are some other technical objections to the service, but these are all that were argued.

Exception à la forme dismissed with costs.

Painchaud for plaintiff.

St. Pierre & Scallon for defendant.

SUPERIOR COURT.

MONTREAL, Jan. 31, 1881.

Before JOHNSON, J.

LAFRICAIN v. VILLENEUVE, & DUGAS et al., T. S.

Exemption from seizure—Salary of "Precepteur."

JOHNSON, J. This is a contestation by the defendant of the declaration of one of the tiers saisis (Mr. Massue), who makes statement that in his quality of executor of the will of the late Mr. Massue, he has engaged the defendant as travelling tutor to young Mr. Massue, a minor, and the tutor and the pupil are now in Europe for the purpose of the latter's education; the tutor receiving a salary of \$1,000 a year,

payable half-yearly in advance; and the garnishee added that on the 15th July, 1879, there was due to this gentleman under this engagement \$500, which he had paid to the defendant's sister under an arrangement made to that effect before his departure, and on the 15th January, 1880, there would be due \$500 more. It is contended that this money would be *insaisissable* under Art. 628; and the contestant relies on the new law introduced by that article exempting from seizure the salaries of school teachers. The French text says "Salaire des Instituteurs." The remuneration stipulated in this case does not come under this head of exemption. Mr. Villeneuve is certainly not a school teacher; and I feel sure also that he is not an "instituteur" in the plain meaning of the article: "Précepteur" would be the proper word to describe his position; and indeed the contestation itself sets out that the defendant was engaged as *précepteur*. Contestation dismissed with costs.

Longpré & David for plaintiff.

Lacoste, Globensky & Bisailon for defendant.

SUPERIOR COURT.

MONTREAL, Jan. 31, 1881.

Before JOHNSON, J.

DEMERS v. LAMARCHE et al.

Demurrer—Allegation of Time and Place.

JOHNSON, J. Two of the defendants plead together, the third separately; but all plead a *défense en droit* to one count of the plaintiff's declaration, i.e., the count which alleges a conspiracy among all the defendants to ruin the plaintiff by putting him into bankruptcy, through the instrumentality of one Perrault. This passage in the declaration, which is demurred to, is quoted in the demurrer, or rather misquoted; for after looking a long time in vain for it throughout the copy of declaration which is made to do service for the original, I found a marginal reference in a very small and cramped hand, which I suppose is the count objected to; and the misquotation is evident. The passage as quoted in the demurrer said that the count charged the defendants with conspiracy *dans le but de le ruiner et d'exercer ses droits*. The passage itself of course reads: *dans le but de l'empêcher d'exercer ses droits*. I only mention this as an instance of how careless the defendants themselves are. However, the

objection itself is to plaintiff's omission to give in this marginal note, which is called by the defendants a "*second chef*," the day and the place on which the defendants did these things. That would be no ground of demurrer. At most it would be ground of objection to form as deficient in particularity. The demurrer is dismissed with costs.

Défense en droit dismissed.

Longpré & Co. for plaintiff.

Archambault & Co. for defendants.

SUPERIOR COURT.

MONTREAL, JAN. 31, 1881.

Before TORRANCE, J.

LEONARD V. JOBIN.

Wages—Services rendered to a near relative without agreement as to remuneration—Prescription—Evidence.

The demand was to recover remuneration as housekeeper of Marie Sophie Jobin, deceased. Mlle. Leonard had lived with the deceased from 28th October, 1876, until 28th December, 1878. She claimed at the rate of \$12 per month, which would make a sum of \$312, but the demand was reduced to \$100 by reason of prescription under C. C. 2261, s. 3. It was made against the legatee. The defendant pleaded 1st. prescription of one year under C. C. 2262, s. 3; 2nd. that Mlle. Leonard resided with deceased as a friend and without any engagement.

PER CURIAM. The plaintiff left the house of the deceased in December, 1878. The deceased died in July, 1879, and the action was only instituted on the 4th September, 1880. The deceased had a small store and the post-office in Isle Perrot, and for some time the head of the establishment was the Curé Ricard who was towards the end without means, and must have depended upon the kindness of the deceased for board and lodging. He was the uncle of the plaintiff. She herself was daughter of a well-to-do notary of Beauharnois, and at her father's, wanted for nothing, and was under no obligation to go elsewhere for a living. She states in her testimony that the curé promised to make her his heir, but that he had nothing. She also frankly states that she had never stipulated from the curé or the deceased a price for her services in the household, nor any agree-

ment for salary or wages, and she had never made any demand upon either for salary or wages. She added that Mlle. Jobin, the deceased, had told her that if she had the means to pay her in her lifetime, she would pay her, and if she had not the means, her heir, the defendant, would pay her. She had not thought of making any demand in the lifetime of the deceased. Joseph St. Maurice, a witness, says he heard a conversation between the deceased and the father of plaintiff, deceased, saying to him, "let me have Alma (meaning plaintiff), I will pay her, and if I do not, my family will." The deceased also sent a message to plaintiff, saying that Mme. Masson (defendant) wished her to be there, and had conscience to pay her, and would pay her well. These are the main facts. Next as to the prescription of one year. I do not see how I can avoid applying it. Plaintiff was an employee, if such at all, for less than a year. And even if it did not apply, I have difficulty in allowing verbal evidence of a promise to pay on the part of the deceased. It is a matter over \$50 and not commercial. Lastly, the parties were friends. The curé and the deceased lived jointly on the produce of an orchard and establishment, and the ferry to the island, and plaintiff was niece of the curé. I apply here a dictum to be found in Addison on Contracts (738): "But if the service has been with parent or uncle, or other near relation of the party serving, a hiring cannot be implied or presumed from it, but an express hiring must be proved in order to support a claim for wages, for the law regards services rendered by near relations to one another as gratuitous acts of kindness and charity, and does not presume that they are to be paid for unless there is an express contract to that effect." Action dismissed.

Longpré & David for plaintiff.

Duhamel & Co. for defendant.

SUPERIOR COURT.

MONTREAL, JAN. 31, 1881.

Before TORRANCE, J.

RHEAUME V. BOUCHARD.

Action en déclaration d'hypothèque — De'endant exposed to trouble entitled to security.

The action was *en déclaration d'hypothèque* to recover \$251 with interest and costs amounting

to the further sum of \$36, which Ambroise Trudel stipulated with Bouchard that he should pay to plaintiff. The defendant pleaded that over and above the sums by him undertaken to be paid to Rhéaume, there was an encumbrance on the property of \$492, duly registered, under a sale from Marc Trudel and Onesime Deblois, 13 October, 1877; that he had just reason to fear trouble by an hypothecary action from Trudel and Deblois, and he had a right to delay payment of the sums now demanded until plaintiff or Ambroise Trudel, his vendor, should have removed this fear or given security in the terms of C. C. 1535. He offered the interest due on the price for the time of his enjoyment, namely, \$11.87, from 1st January, 1880, until the institution of the action. He concluded that the part of the action demanding a personal condemnation against him be dismissed for the surplus over \$11.87, unless plaintiff should cause the fear of trouble to disappear, or give security in terms of the article 1535.

PER CURIAM. I have no difficulty in holding that the stipulation in favor of Rhéaume is a valid one. (See *Journal du Palais*, A.D. 1877, p. 784; *Gadoury v. Archambault*, S. S., A.D. 1878; in review at Montreal.) But there is behind, the plea of the defendant, alleging an incumbrance and fear of trouble, and asking for security under C.C. 1535. The allegations of the plea are supported by the evidence, and the Court therefore grants the conclusions, and orders security to be given as prayed.

Laflamme & Co. for plaintiff.

J. E. Robidoux for defendant.

RECENT ENGLISH DECISIONS.

Will—Conditions in restraint of marriage to particular class not invalid.—A testatrix devised real estate in strict settlement to her brother for life, with remainder to his issue in tail, with remainders over in default of failure of her brother's issue. The will contained a proviso that if the brother married a domestic servant the limitations in favor of himself and his issue were to be absolutely null and void, and in lieu thereof the testatrix devised her real estate to the use of such person, and with such limitations as the same were devised in default or failure of issue of her said brother. The brother married a domestic servant. *Held*, that the condition not being in general restraint

of marriage, but only in restraint of marriage with one of a specified class, was good. *Perrin v. Lyon*, 9 East, 170, followed.—*Jenner v. Turner*, 43 L. T. Rep. (N.S.) 468.

Slander—Words not slanderous in primary sense must be shown slanderous innuendo.—In an action of slander where the plaintiff, in his statement of claim, annexes a meaning to the words complained of, and fails to sustain such meaning, he cannot discard that and adopt another. Where words which are not slanderous in their primary sense are taken in a secondary sense distinct from their primary sense, there must be evidence of facts which would reasonably make them defamatory in their secondary sense. In this case the plaintiff alleged in his statement of claim that the defendant falsely and maliciously spoke and published of the plaintiff the words, "His shop is in the market," meaning thereby that the plaintiff was going away and was guilty of fraudulent conduct in his business, inasmuch as he had received subscriptions from members of a certain club, well knowing that they would be unable to obtain any benefit therefrom. There was no evidence to support the innuendo. *Held*, that the words, not being in themselves defamatory, and there being no evidence to wholly support the innuendo, the defendant was entitled to judgment.—*Capital and Counties Bank v. Henty*, L.R., 5 C.P.D. 94.

GENERAL NOTES.

OATHS AND GLOVES.—During the hearing of a case in the Edmonton County Court recently, Mr. Houghton, barrister, directed a lady to take off her glove before she was sworn as a witness. The judge, Dr. Abby, said he thought that was a matter which rested entirely with him. He did not attach so much importance to oaths being taken with ungloved hands as many individuals seemed to do, and his opinion was shared by an eminent judge of the Superior Courts, whose name it is not necessary to mention. It was not the ungloved hand, but the manner in which the oath was taken, that made it binding. Some oaths were taken without a book at all; for instance, the Chinese form of oath.

Some people imagined that the glove should be removed because there should be nothing between the sacred book and the hand of the person who held it; but the solemnity with which the oath was taken was the only point in the oath itself. If greater force were given to the oath by merely holding the holy volume in an ungloved hand—he meant if the absence of the glove caused the book itself to be regarded with increased reverence—he would ask how could the use of the gloves be justified in church, where many of the congregation could always be seen reading their Bibles when their hands were gloved? Reverence in taking the oath was the only thing which was necessary. He had seen people to whom the oath was administered so hold the book that the kiss fell upon the thumb; but woe betide those who thought to escape the consequences of giving false testimony by such subterfuge!—*Ir. L. Times*.

The Legal News.

VOL. IV. FEBRUARY 19, 1881. No. 8.

ADMINISTRATION OF JUSTICE.

The bill, to authorize the appointment of a new Judge to the Court of Queen's Bench and to the Superior Court, provoked a discussion which lasted during a whole evening in the Commons. To some of the points which arose in the debate we may refer hereafter. In the meantime we think our readers will be interested in the following letter which was addressed by Mr. Justice Torrance to the Attorney General of Quebec, and which treats of the same subject as was discussed in Parliament:—

MONTREAL, 21st June, 1880.

SIR,—The announcement in the Legislature of Quebec that it is proposed to provide for the nomination of two new Judges for the Superior Courts—one in the Queen's Bench and one in the Superior Court—appears to me to afford a fitting opportunity for a few observations on the administration of justice in the Province of Quebec.

It is a singular fact that of the Judges of the Superior Courts for the Province of Quebec, there are no fewer than ten on the retired list. The sister province of Ontario has three County Judges on the retired list, but none from the Superior Courts. There have been repeated complaints of the administration of justice in Quebec, and it is probable that the Judges of Quebec have not found their position so agreeable as to desire to occupy it longer than is necessary to give them a claim to be placed on the retired list. Why, I may ask, should the Judges of the Superior Court be obliged in Quebec to give half their time to that work which in other Provinces is performed by County Judges? Why should the respected and honored Chief Justice of the Superior Court be required to give his valuable time to dispense justice between servants and laborers and petty trades-people, in Courts which he never entered when he had the reputation of having the largest practice in the Province? In the

other Provinces the Judges of the Superior Courts have been relieved from the duty of administering justice in the inferior Courts—Manitoba and Quebec stand alone in this respect.*

Here I should remark that it has sometimes been said that the expense of the administration of justice has been greater in Quebec than it should have been. I hardly think that this reproach is well-founded if it be true that the Dominion, for the year ending June, 1879, paid on this head for Ontario, \$198,585.85, and for Quebec, \$152,173.39. What is wanted in Quebec is a readjustment of judicial work, so that it shall be distributed fairly and equally in all parts of this Province.

As it is, the distribution has been most unfair. For example: Montreal has had the credit of giving more occupation to the Judges than the whole of the rest of the Province taken together. The Judges there have been incessantly occupied, while there are Districts where the resident Superior Court Judge has not had occupation for a month in a year, perhaps not a week.

It is time that the Judges of our Superior Court should all of them sit on the Bench in turn in the cities of Montreal and Quebec. It is there that the leading men in the profession of the law chiefly congregate, that libraries are to be found, and that the spirit of association and conference, which is so strong in these days, can have its proper development. A numerous and highly educated Bar has an undoubtedly beneficial influence upon the Bench, which has been constructed from the Bar; and the Bar is, on the other hand, influenced by the Bench, if it is as it should be, in sympathy with it. But the country districts are entitled to the same justice which is meted out to the people of the towns, and to this end the same Judges should periodically administer the same law to town and country. I believe the Bar and the Bench are alike agreed that the present system, which banishes to the country some of our best lawyers and Judges, is radically defective; that it is a failure and must be changed.

There is a simple remedy. There need not be any sudden change. The Judges of the

*Ontario has 51 County Judges; Nova Scotia, 7; New Brunswick, 5; Prince Edward Island, 3; British Columbia, 5.

Superior Court might, as vacancies occur, be appointed to reside where they could most conveniently be located for the general interests of the Province.

The Province is divided into twenty Judicial Districts, of which ten are in the Quebec division and ten in the Montreal division. The Superior Court has one Chief Justice. I would propose an additional Chief Justice for the Montreal division. Ontario has four Chief Justices, counting the Chancellor as one. Quebec would be better with three than with two. As to the eighteen country Districts, as vacancies occur among the Judges, District Judges should be appointed with the same powers. Besides the sitting of the Courts held by the District Judges, there might be terms of the Superior Court to be held three times in the year, and I would give the plaintiff the option of inscribing his case for hearing on the merits before the District Judge, or before three Judges of the Superior Court in term. If the judgment be rendered by the District Judge, then the party aggrieved to have the right of inscribing in review as at present or in his own District at his option.

I append a scheme of the practicable operation of this plan, which I am confident would, under the supervision of a Chief Justice, who should be responsible for its working, be an immense improvement upon the present system, and acceptable alike to the Judges, the Bar, and suitors.

For the cities of Montreal and Quebec, I would propose District Judges in the proportion of three for Montreal and two for Quebec: these Judges should relieve the Judges of the Superior Court from the duty of sitting in Insolvency, the Circuit Court and at Enquêtes.

The jurisdiction of the Circuit Court might be raised to \$500, from \$200. Three of the Superior Judges could always be employed as required on Circuit, and the Bars of the country and city would be much better served than they can now be, by the present judicial strength. My plan has further this advantage, that it will not add to the burdens of the country when fairly in operation. If it were possible to make an immediate change the expense would be \$124,500, in place of \$126,000.

In conclusion I beg humbly to make the following observations:—

1. If the present system be continued, one

additional Judge, in the Superior Court, Montreal, would not give the relief required. Two would be needed.

2. If the opinions of the Judges themselves were taken, I believe that they would not suggest an addition of Superior Court Judges.

3. If the system were reformed in the direction indicated, a Superior Court Judge would always be available to assist the Judges of the Queen's Bench (criminal side), Montreal and Quebec.

4. The creation of a sixth Judge in the Queen's Bench is unnecessary.

5. It is indispensable for the prosperity of the Superior Court that the Judges should have continual opportunities for association and conference. Such opportunities would be given by forcing them to sit in turn at the centres.

6. Economy being imperatively demanded by the Dominion Legislature, the addition of two Superior Court Judges to the number resident in the cities of Montreal and Quebec, seventeen in all, would be a significant contrast to the number required in Ontario, being thirteen in all.

7. The exigencies of the case demand the appointment of a Commission, which should form a system suitable to the wants of the Province. A Bill might be framed upon its suggestions, and submitted to the criticism of Judges, Bar and public, for a year or two. Then only would the people be prepared for a change.

I have the honor to be, Sir,

Your most obedient servant,

F. W. TORRANCE.

To the Attorney General

for the Province of Quebec.

APPENDIX A.

Present System.—Superior Court.

1 Chief Justice.....	\$ 6,000
9 Puisne Justices.....	45,000
14 do do	56,000
2 do do	7,000
	\$114,000
3 additional Judges for vacant Districts, say	12,000

\$126,000

Vacant Districts are Terrebonne, Montmagny, Saguenay.

APPENDIX B.

Proposed System—Superior Court.

2 Chief Justices, 1 Montreal, 1 Quebec	\$ 12,000
10 Puisne Judges.....	50,000
5 District Judges, \$3,000 each; Quebec, 2; Montreal, 3.....	15,000
16 District Judges, \$2,500 each, for country Districts, to take place of present country Superior Court Judges when vacancies occur.....	40,000
	<hr/> \$117,000

The above would supply present wants.

To complete the system 3 additional District Judges when wanted for vacant Districts, say at \$2,500 each.....	7,500
	<hr/> \$124,500

Travelling allowances as in other Provinces.

APPENDIX C.

Montreal (City.)

No change as to terms; with the changes proposed the Judges could give the Bar all the relief required.

Montreal (Country.)

9 Districts, 3 terms (civil) 3 days each, 3 Judges.....	243 days.
9 Districts, 2 terms (criminal) 3 days each, 1 Judge.....	54 days
	<hr/> 297 days.

I make no remark as to the Quebec Division.

THE SUPREME COURT.

The bill introduced by the late Mr. Keeler, to repeal the Supreme and Exchequer Court Act, was taken up by Mr. Landry. On the 10th instant, on the motion for second reading, Mr. Mills moved in amendment the six months hoist, which was carried, after debate, by 88 to 39.

Another bill, to limit the appellate jurisdiction of the Supreme Court, has been brought forward by Mr. Girouard, Q.C. Sect. 1 is as follows:—

“The Appellate Jurisdiction of the Supreme Court of Canada is abolished in all cases where the matter in dispute relates to property and civil rights in any of the Provinces, and generally as to matters of a merely local or private nature and coming within the exclusive jurisdiction of the Legislature of any of the said Provinces, according to the meaning of the British North America Act of 1867 and Acts amending the same.”

Sect. 2 provides that the Act “shall not

apply to cases decided by the Exchequer Court of Canada, nor to cases where the matter in dispute affects the constitutionality or validity of any Act or Statute of any of the Provincial Legislatures, which cases shall continue to be subject to appeal to the Supreme Court, as now is or hereafter shall be provided for.” And the third and last section enacts that the bill shall not apply to appeals already instituted or pending before the Supreme Court.

NOTES OF CASES.**COURT OF REVIEW.**

MONTREAL, November 13, 1880.

RAINVILLE, PAPINEAU, LAFRAMBOISE, JJ.

[From S. C., Montreal.

DEVLIN V. BREMER.

*Commission for procuring security for contract—
Commission earned notwithstanding invalidity
of contract guaranteed.*

The judgment inscribed in Review was rendered by the Superior Court, Montreal, Torrance, J., June 30, 1880. See 3 Legal News, p. 232.

PAPINEAU, J., rendered the judgment in Review, reversing the judgment below, for reasons which are set out in the recorded judgment as follows:—

“La cour, etc....

“Considérant que par l'acte intervenu entre les parties en cette cause, le 23 d'avril 1879, et qui fait la base de l'action du demandeur, il est établi que ce dernier avait procuré le même jour au demandeur, qui en avait besoin, un cautionnement hypothécaire au moyen d'une certaine obligation et hypothèque consentie par Dame Margaret Amanda McNally, l'épouse du demandeur, en faveur de l'Honorable Joly, et que, à cause et en considération de ce cautionnement, le défendeur s'est obligé de payer au demandeur une commission au taux de 7 pour cent par an sur \$11,784, à compter du 15 de décembre 1879, la dite commission payable semi-annuellement jusqu'à la quittance et décharge de la dite obligation, le premier paiement semi-annuel devenant exigible le 15 de décembre 1879, si la dite obligation hypothécaire n'était pas encore quittancée et déchargée à cette dernière date;

“Considérant qu'il est établi par la lettre même du défendeur, en date du 19 de décembre

1879, et par les autres parties de la preuve, que la dite obligation hypothécaire n'était pas encore déchargée à cette date, et même que le défendeur en avait encore besoin pour une période de temps qu'il ne pouvait alors déterminer ;

" Considérant que le demandeur, ayant rempli de son côté toute son obligation, qui était de procurer le dit cautionnement hypothécaire, a droit d'exiger du défendeur l'exécution de son obligation, qui était le paiement d'une somme d'argent pour prix du cautionnement actuellement fourni ;

" Considérant que la validité ou la nullité du contrat du défendeur avec l'Honorable Joly n'a rien à faire avec la validité du contrat du demandeur qui a procuré au défendeur, au moyen d'une hypothèque considérable dont celui-ci avait le bénéfice, la jouissance de la propriété de l'épouse du demandeur, qui eût été privée elle-même d'en jouir de la même manière si le besoin de l'utiliser de cette manière se fût fait sentir par elle ;

" Considérant, d'ailleurs, que la nullité invoquée quant au contrat de l'Honorable Joly avec le défendeur et invoquée par celui-ci, n'était qu'une nullité relative décrétée en faveur du gouvernement qu'il représentait, et que le gouvernement en faveur de qui cette nullité est décrétée, n'a pas jugé à propos de s'en prévaloir, que le contrat a été de fait exécuté, et qu'il n'y a pas lieu d'en prononcer la nullité lorsque la partie intéressée à la faire prononcer, ne l'a pas demandé et ne le demande pas encore ;

" Considérant qu'il y a erreur dans le susdit jugement du 30 juin 1880 : Cette cour infirme le dit jugement, et procédant à rendre celui qu'eût dû rendre la dite cour supérieure : condamne le dit défendeur à payer au dit demandeur la somme de \$412.54, avec intérêt, etc."

Judgment reversed.

Coursol, Girouard, Wurtels & Sexton, for plaintiff.

Carter, Church, Chapleau, Carter & Busted for defendant.

SUPERIOR COURT.

MONTREAL, JAN. 31, 1881.

Before JOHNSON, J.

CORREIL et al. v. CHARBONNEAU et vir, and MARTINEAU et al., T. S.

Saisie-arrest—Seizure of real estate.

JOHNSON, J. This case has been heard on the

merits of the petition to quash the *saisie-arrest*, and also on a motion to amend. The latter, though it hardly seems necessary, may be granted without difficulty.

On the merits of the petition there is not much to be said. The writ issued of course on an affidavit, and a house and lot were seized ; and on the return a petition was made to set aside the seizure on the ground that under the writ, real estate could not be seized. That point was decided against the petitioner ; * and it is only in so far as the facts go, that the subsequent contestation took place. The evidence fails to show that the affidavit is untrue. The question of law is certainly important, but I decline to enter upon a discussion of it now, after the judgment of Mr. Justice Rainville, to which, without expressing any individual opinion, I agree to conform for practical reasons.

The petition, therefore, on the merits is dismissed with costs.

Dalbec, for plaintiffs.

Loranger & Co., for defendants.

SUPERIOR COURT.

MONTREAL, JAN. 31, 1881.

Before JOHNSON, J.

LAFRANCE v. JACKSON.

Service—Personal Action.

JOHNSON, J. This case comes up on the merits of a declinatory exception. The exception sets up that the contract of hiring alleged between the parties was not made as alleged, i.e. in this Province ; but in the Province of Ontario, and that the service (which was a personal service in Montreal) does not bring the defendant before the Court so as to give it jurisdiction. The case of *Gossel & Robin* and others (2 Q. L. R. p. 91) was cited for the defendant. That was an action *pro socio* where the service depended on the domicile of the party ; and it was pretended that in such a case as that, where the action was not purely personal, as it is here ; that the defendants being absentees, and having their principal place of business in Jersey where their property might have been liable to division under the judgment of the Court, could be called in by advertisement because they had property at

* See 3 Legal News, p. 381.

Gaspé. Such a case as that is of course clearly distinguishable from this. Here the action is purely personal, as required by Art. 34 C. P.; not mixed as it was there, and the terms of the judgment of Chief Justice Dorion leave no doubt as to the grounds on which it rested. A personal action, however, follows the person; and a personal service in Montreal in such a case, gives us, under Art. 34, jurisdiction over it.

Prévost & Préfontaine for plaintiff.

R. A. Ramsay for defendant.

SUPERIOR COURT.

MONTREAL, Jan. 31, 1881.

Before JOHNSON, J.

BOZZO v. MOFFATT at al. & E. Contra.

Pleading—Freight—Plea of compensation by damages, to action for liquidated claim under charter party, not demurrable.

JOHNSON, J. This is an action to recover freight under a charter-party, and the defendant pleads among other things that the cargo was damaged by the plaintiff's fault, and wants to compensate the freight by the damage. This is demurred to by the plaintiff. Then, in the second place, there is another demurrer partial addressed to one passage or paragraph of the same plea, in which the defendants had said that even supposing the charterers had employed a stevedore the master would not be relieved from the obligation of care in stowing. So that there are two points:

1st. Whether in this country and under our procedure a plea of compensation for damage will hold as against a liquidated claim under a contract of charter party.

2nd. Whether the master's negligence is superseded, so to speak, by the charterers having employed a stevedore.

I over-rule the demurrer on the first point. It is merely a matter of form, under our procedure quite unimportant. It may be admitted that the demurrer would lie in England; but, unless the English procedure is to govern here, (which of course I don't admit) I must adhere to our practice of allowing easily liquidated damages to be made ground of compensation. The case of *Gaherty & Torrance* et al. is directly in point, (6 L. C. J. p. 313.) The judgment there in express terms allowed the plea of com-

pensation for damage against the action for the freight.

As to the second point, it is difficult to say (though this hypothetical way of pleading is highly objectionable) that the proposition emitted is not conformable to law. The thing would depend a good deal on the facts intended to be enunciated in this proposition. The employment of the stevedore, unless he really interfered, would amount to very little. This averment under our somewhat loose system may probably let in evidence that the master actively interfered. I cannot anticipate or limit the proof. I give no opinion on such an averment; but I allow proof *avant faire droit*.

Doutre & Co., for plaintiff.

Davidson & Co., for defendants.

SUPERIOR COURT.

MONTREAL, Jan. 31, 1881.

Before JOHNSON, J.

NADON et vir v. CHARRETTE.

Pleading—Demurrer—Compensation.

JOHNSON, J. The plaintiff alleges that the seizure of the cart and horse on the high road was illegal and malicious, and has caused the damage complained of. That is enough to give a right of action if it is true. The *défense en droit* to the declaration is therefore dismissed with costs.

Then the defendant pleaded compensation, and the plaintiff demurs to that. Well, that demurrer is dismissed also. The plaintiff cited a case in the 13 L. C. Reports. That case is misreported. I considered the matter in *Landa v. Pouleur*,* and so held there.

Loranger & Co., for plaintiff.

Duhamel & Co., for defendant.

SUPERIOR COURT.

MONTREAL, Jan. 31, 1881.

Before JETTE, J.

DEVINE et al. v. GRIFFIN.

Executor—Administration—Imprudent Investment.

The action was to have the defendant removed from his office of executor.

JETTE, J., gave judgment in favor of the defendant, the reasons being in substance as follows:—

The plaintiffs, three of the testamentary

* (1) See 1 Legal News, p. 614.

heirs of the late Lydia Hoyle, asked for the removal of the defendant from the office of executor of the will of the late Lydia Hoyle, on the ground of incapacity and unfaithfulness in the fulfilment of the duties of his office, and especially invoked in support of their demand a loan by defendant of a sum of \$12,938 to James C. Ritchie, his son-in-law, without any security for the repayment of that sum at the time the loan was made, and for which he only received, long after, hypothecary security, said to be for the most part insufficient and illusory, which he had nevertheless released, contrary to the interest of the succession. It was further alleged that the defendant neglected for several years to collect the interest on the loan, and that in acting thus he was guilty of fraud and showed himself to be grossly incapable.

The defendant contested this demand, saying, 1st. That his administration, far from being disadvantageous to the succession, had been extremely profitable, having in particular realized a profit of \$5,000 by the well-timed sale of Bank of Montreal stock—a profit which the heirs would have lost if the sale had not then been made. 2nd. That the plaintiffs had already instituted an action *en reddition de compte* against him, which was still pending; that defendant had rendered the account asked for, on the 17th January, 1878, and that since that time the plaintiffs had continually delayed the case; and that the present action could not be brought while the other was pending. 3rd. That at the time of the loan to Ritchie, the latter was reputed to be rich, and was in good business, and the investment was under the circumstances considered satisfactory; that, moreover, it was made in good faith, that the security was then perfectly satisfactory: and that the subsequent discharges were given to facilitate the sale of the hypothecated properties; and secure payment of the claim. 4th. That as to the two plaintiffs of age, Mrs. Ireland and Mr. Devine, they had no interest in bringing the present action on the ground alleged, because by deeds of July, 1878, and of 12th May, 1879, they had settled with defendant for the sum coming to them from the loan to Ritchie; and as to the minor, Aunie Emily Devine, her share in the succession was fully secured by the personal guarantee of defendant and other securities taken for the payment of the Ritchie

debt; and finally, that defendant had always been ready to pay to said minor her share, and had tendered the same, and offered security for it.

By an additional plea defendant alleged, in answer to the action, that since the demand he had given the minor a hypothec for \$10,600 on a property worth more than that.

In fact, though it results from the evidence that the loan to Ritchie could not be considered a satisfactory operation, and that whatever confidence defendant might reasonably have in Ritchie's solvency, the loan was not made according to the conditions required in such cases, nevertheless the defendant does not seem to have acted in bad faith, but has only been guilty of negligence and imprudence. This loan is the only act complained of, and his administration is not attacked otherwise, though it is proved that a total amount of about \$50,000 from the succession has passed through his hands, and this loan seems to be all that remains to be adjusted. The defendant has not only always acknowledged his responsibility for the amount of the loan, but he has satisfied the two plaintiffs who are of age as to their share of the amount, and he offers all requisite hypothecary and other security for the minor's share in the succession, and has done what he could to secure the minor's interest, which offer has not been accepted by the tutor. The personal solvency of the defendant has not been questioned, and the sufficiency of the guarantees offered is established. In law, the plaintiffs who are of age, having received their share of the loan, cannot invoke it in support of the present action. The offers made by the defendant as to the minor's part are sufficient security, if they had been accepted by the tutor, and the absence of interest on the part of the other plaintiffs renders their demand untenable, and even invests it with the character of a vexatious proceeding. The Court considers further that the action to account gives the plaintiffs full and ample protection, and that under the circumstances the removal of the defendant from office cannot be ordered.

Action dismissed.

Keller & McCorkill for plaintiffs.

Bethune & Bethune for defendant.

THE LAW OF TELEPHONES.

A new question in what we might term the yet unsettled Law of Telephones, was determined last week in the Circuit Court of this city. The American Union Telegraph Company having been unable to obtain from the Bell Telephone Company the privilege of an instrument in their office, applied to the court for a *mandamus* to compel the company to accede to their request. After argument the court overruled the motion to quash the alternative writ. Thayer, J., who delivered the judgment, held that the principles of law applicable to railroad companies and other common carriers unquestionably applied to telegraph and telephone companies. Having established their lines and adopted a uniform mode of serving the public consistent with their chartered powers, they must treat all persons similarly situated with respect to those lines alike, and without unjust discrimination. It is not for them to select whom they will serve, or impose conditions of service on one class of customers that do not apply equally to all persons occupying the same relative position toward the company. It was conceded by the court that if the respondent had contented itself with erecting its lines and establishing its affairs at certain designated points, and had stationed its own agents at such offices to receive and transmit messages, as is usual with telegraph companies, it could not have been compelled, at the request of any private person or corporation, to place instruments in private offices or residences, and establish private stations for the use of particular individuals or corporations. If it had elected to use its franchise in the manner last indicated, its duty to the public would have compelled it to receive and transmit such messages as were tendered at its own offices to its own agents, without discrimination as to persons or as to the price charged for such service. And it could not have been compelled to assume other obligations or render other service to the public. "But if it erects its main line along a certain street or streets," said the court, "under a power granted in its charter to use public highways for that purpose, and under a charter granting it the power to condemn land for the construction of a telephone line, and if it elects to serve the public by furnishing instru-

ments to residents along such line, for private use, and by making connections between such instruments and its main lines; above all, if it holds itself out to the public as prepared to furnish such instruments and make such connections for all who may apply, than I should say that its duty to the public compels it to treat all residents along such line with absolute impartiality. It cannot grant such facilities or render such service to one citizen or corporation and refuse like privileges to his next door neighbor. The charter of the respondent was not granted for any such purpose, nor does it confer upon the corporation any such power to discriminate among its customers. According to the averments of the petition, the respondent has adopted the mode of transacting business within the city of St. Louis last above indicated. Instead of maintaining offices in charge of its own agents for the reception and transmission of messages at certain designated points, it supplies instruments to residences, offices and hotels contiguous to its main line, and makes all proper connections with such main line at uniform rates, and holds itself out to the world as prepared to supply all persons with such facilities for communication, who reside or occupy offices contiguous to its established lines. Such being the established mode of transacting business adopted by the respondent, according to the averments of the bill, it follows, from the principles above stated, that in refusing to grant to the relator such facilities as it affords to other customers it has violated an imperative public duty imposed upon it by law."—*Central Law Journal, St. Louis.*

RECENT DECISIONS AT QUEBEC.

Wages—Minor.—The father of a minor sued for wages due to the minor. He did not allege that he had been appointed tutor, or that he had put his son in the defendant's service. *Held*, that the action was demurrable, though there was an allegation that the defendant had acknowledged his indebtedness to the plaintiff. *Renaud v. Dussault* (C. C. Quebec), 6 Q. L. R. 259.

Extradition.—A warrant of commitment for extradition should in its terms conform to the requirements of sect. 1, 31 Vict. (Can.) c. 94, in directing the person accused to be committed until surrendered on the requisition of the proper authority or duly discharged according

to law. The judge is required to decide whether he deems the evidence adduced before him sufficient to justify the apprehension and commitment for trial of the person accused if the crime had been committed in Canada. If he finds in the affirmative he should so state it in his commitment, and certify the fact to the proper executive authority. His functions do not extend to determining whether the accused should be extradited; that rests with the Governor General after the evidence has been reported to him. If the judge fails to state in the commitment that he deems the evidence sufficient, the commitment will be held defective and insufficient.

Where a person charged with a crime is committed in pursuance of a special authority, the commitment must be special and must exactly pursue that authority. If the commitment does not on its face show that the case of the accused falls within the terms of the extradition treaty and the statutes authorizing the proceedings in extradition, or fails to contain the proper statutory conclusions, no sufficient cause of detention will have been shown, and he will be liberated on *habeas corpus*. (Q. B.), *Ex parte Zink*, 6 Q. L. R. 260.

Prescription.—A charge, partly for manual work done and partly for moveable effects sold and delivered, (as, for example, for the care and feeding of animals by a farmer, including the supply of the fodder consumed,) is prescribed by five years.—*Lefebvre v. Proulx* (C. R.), 6 Q. L. R. 269.

Attachment—Affidavit.—In an affidavit for attachment it is not necessary to state the time when or the place where the debt was contracted. (*Hurtubise v. Bourret*, 23 L. C. J. 131, followed.)

2. The allegations in an affidavit for attachment under C. C. P. 834, as to the grounds of deponent's belief that defendant is immediately about to secrete his property, &c., may be stated according to form 45, although that form is given in connection with Art. 842.—*L'Heureux v. Martineau*, (S. C.)—6 Q. L. R. 275.

Procedure—Registrar's Certificate—Contestation.—Under the existing law, by which a hypothecary creditor is not required to file an opposition *a fin de conserver*, he is not obliged to contest the registrar's certificate at the same time that he contests the report of distribution. *Carrier v. Boucher* (C. R.) 6 Q. L. R. 282.

RECENT CRIMINAL DECISIONS.

Manslaughter—Negligence.—A. was a member of a rifle corps. On May 29 he attended the rifle practice. After the practice it was his duty to take his rifle back to the armory. He did not do so, and the drill instructor missed six cartridges from the magazine when he went there about half an hour after the practice was over. A., with B. and C., then fixed a temporary target in an apple tree in a garden, and fired with the rifle from a distance of 400 yards. One of the shots killed a boy who was in the apple-tree. The jury found A., B., and C. guilty of manslaughter. There was no evidence which of the prisoners fired the shot which caused death, and the question reserved was whether there was any evidence upon which either or all of the prisoners could be convicted of manslaughter. *Held*, that the conviction was right; because the prisoners all joined in a dangerous act, (without taking proper precautions) whereby a person was killed.—*Regina v. Salmon*, crown case reserved, Dec. 4, 1880. (43 L.T. Rep. N.S. 573.)

Indictment—Burglary and Larceny.—An indictment for burglary and the larceny of certain articles "of the goods and chattels of A and B," is not sustained if the articles, all in the possession of A., belonged some to A. and some to B.—*State v. Ellison*, Supreme Court, New Hampshire. (To appear in 58 N.H.)

Assaults upon children.—A person charged with assaulting a child of seven years of age, may allege the consent of the child as a defence.—*Regina v. Roadley*, Crown Case Reserved. (49 L.J., M.C. 88.)

GENERAL NOTES.

The *Irish Law Times* is the authority for the following amusing anecdote of a conscientious witness and how his objection was overcome by a quick-witted judge:—

"While the jury were being sworn in what is known as the Kilbury Eviction case, at Waterford, on the 16th December, one of them entered the jury-box with his hat on, and on being asked to remove it, addressing his Lordship, said, 'I have a conscientious objection against taking off my hat.'

"Mr. Justice Barry, 'Then some other gentleman will take it off for you.'

"Whereupon another juror immediately removed the hat."

The Legal News.

VOL. IV. FEBRUARY 26, 1881. No. 9.

HINTS FOR STUDENTS.

The inaugural address delivered by Mr. Justice Ramsay at the opening of the Law Faculty of Lennoxville University (noticed in the *Legal News*, p. 346 of Vol. 3), has been issued in pamphlet form, from the press of the Gazette Printing Company, and will do doubt be of interest to students in general as well as to those for whom it was more immediately intended. After a graceful allusion to the founder of the University, the late Bishop Mountain, the learned judge proceeded to offer some practical suggestions to students about to enter upon a course of legal study. They were reminded of the importance of wise selection among the enormous number of books published, in order that their reading may be profitable. On this head Judge Ramsay related his own experience:—

"In my days of studentship, over thirty years ago, there was no regular teaching. Anything we learned was picked up by the practice we saw in an office and the books we chanced to read. I was dismayed at the endless rows of dingy books, then rarely enlivened by the gay morocco backs of the *nouveau droit*. I had, however, the advantage of being the pupil of the present learned Chief Justice of the Superior Court, and to him I applied for advice as to what I should read. He told me of 'Pothier's Obligations.' From the moment I opened it, the dread of the dryness of law disappeared as by enchantment, and starting from one word rolled forth a perfectly clear explanation of the whole scheme of legal rights and liabilities."

In addition to the works of Pothier, Judge Ramsay advised that attention should be given to the Roman law, and proceeded to urge upon students the necessity of cultivating a good style of pleading, oral as well as written. "Don't leave it to chance, whether the judge shall understand you or not, but so put your case that whatever difficulties may beset him in coming to a conclusion, he can have none as to what your pretensions are."

The learned judge combated the pretension that a lawyer must be satisfied of the innocence of his client before he gives him professional aid.

"It is a result of experience that the administration of justice must be carried on upon exact principles, consequently with great technicality. To do this, skilled persons, to represent the parties, are required. The advocate, therefore, becomes a part of the organization for the discovery of truth, and if he were to take upon himself to refuse his assistance to the accused, because he believed him to be guilty, he would be depriving him of the protection the law accords, without authority. For the chance of doing what he thought was substantial justice in a particular case, he would aid in the destruction of a useful system. It is not, however, to be supposed that the lawyer is justified in every act that might perchance be beneficial to his client. He must not transgress the limits of truth. While he may fairly put on facts proved the interpretation most favorable to his client, honor forbids him to misstate."

In conclusion the speaker urged his hearers who were about to enter on the study of the law, not to lose an instant of the valuable time at their disposal, but from the first diligently to turn to account the great advantages now offered to them.

THE SUPREME COURT.

At a meeting of the bar of the Montreal section on the 18th instant, Mr. Girouard's bill, referred to in our last issue, found only 24 supporters in a total vote of 68. The discussion placed the weak features of the proposed enactment in a strong light. Perhaps if the promoter of the bill had been present, he might have adduced some reason more weighty than anything that was advanced in favor of the limitation of jurisdiction; but the feeling of the majority of the profession is evidently to preserve the Supreme Court, to extend its usefulness, and promote its efficiency, rather than to abolish the tribunal, or restrict its jurisdiction.

This is in accordance with the view which we ventured to express nearly a year ago (page 145 of vol. 3), and it is unnecessary to occupy space with the subject at present. There is no complaint from the Maritime Provinces or the North West. Quebec, which perhaps derives less immediate advantage from the Supreme Court than any other Province, has pronounced, through its most influential body, in favor of the tribunal, and Ontario, we are confident, will be no less reluctant to see it interfered with.

COURT OF QUEEN'S BENCH, 1880.

The following is a list of the civil cases in which the judgment of the Court below was confirmed by the Court of Queen's Bench sitting in appeal at Montreal, during the year 1880 :—

Angers & Murray, S. C. Ottawa.
 Banque Ville Marie & Primeau, S. C. Richelieu.
 Bowker & Date, S. C. M.
 Burland & Roberts, S. C. M.
 Canada M. B. Society & O'Brien, S. C. M.
 Canadian Rubber Co. & City of Montreal, S. C. M.
 Caya & Trust & Loan Co., S. C. M.
 Champoux & Lapierre, S. C. M.
 Christin & Valois, S. C. M.
 Citizens Ins. Co. & Grand Trunk, S. C. M.
 Cie d'Assurance & Duhaime, S. C. M.
 Cie de Chemin de Fer & Guevremont, S. C. Richelieu.
 Coté & La Banque de St. Hyacinthe, S. C. Iberville.
 Cottenoir & Parenteau, S. C. Richelieu.
 Cushing & Ducondu, S. C. Joliette.
 Deignan & Kennedy, S. C. M.
 Dillon & Borthwick, S. C. M.
 Dobie & Board of Temporalities, S. C. M.
 Donaldson & Charles, S. C. M.
 Erickson & Cuvillier, S. C. M.
 Foster & Dautre, S. C. M.
 Gareau & Desève, S. C. M.
 Gareau & Prudhomme, S. C. M.
 Gill & Marion, S. C. Richelieu.
 Girouard & Germain, S. C. Richelieu.
 Goff & G. T. R. & Perkins, S. C. M.
 Guy & La Cité de Montreal, S. C. M.
 Hamilton Powder Co. & McArthur, S. C. M.
 Hodgson & Evans, S. C. M.
 Homier & Morin, S. C. M.
 Hus & Brunet, S. C. Richelieu.
 Hus Lemoine Capistran & Nadeau, S. C. Richelieu.
 Kilgour & Logan, C. St. Francis.
 Landa & Pouleur, S. C. M.
 Larue & Molsons Bank, S. C. M.
 Leduc & Western Assurance Co., S. C. M.
 Leveille & Daigle, S. C. M.
 Levy & Levy, S. C. M.
 Limoges & Labelle, S. C. M.
 Longpré & Valade, S. C. M.
 Loverin & City of Montreal, S. C. M.
 Macdonald & Mackay, S. C. M.
 McClanaghan & St. Ann's M. B. Society, S. C. M.
 McLachlan & Court, S. C. M.
 Maher & Aylmer, S. C. M.
 Marchand & Wilkes, S. C. Iberville.
 Massé & Granger, S. C. M.
 May & L'Heureux, S. C. M.
 Mayor et al. of Iberville & Jones, S. C. Iberville.
 Meloche & Merchants Bank, S. C. Beauharnois.
 Moat & Moisan, S. C. M.
 Molson & Carter, S. C. M.
 Moncion & Ford, S. C. Ottawa.
 Montreal Warehousing Co. & Royal Ins. Co., S. C. M.
 Morrison & Mayor et al. of Montreal, S. C. M.
 Morrison & Mayor et al. of Montreal, S. C. M.
 Muir & Jamieson, S. C. M.

Murphy & Merchants Bank, S. C. M.
 O'Brien & Bigras, S. C. M.
 O'Brien & Hadley, S. C. M.
 O'Brien & Weaver, S. C. M.
 Ouimet & Desjardine, S. C. M.
 Owens & Union Bank, S. C. M.
 Pell & Accident Ins. Co., S. C. M.
 Pepin & Desmarteau, S. C. M.
 Pollock & De Bellefeuille, S. C. Terrebonne.
 Potvin & Ford, S. C. Ottawa.
 Riopel & City of Montreal, S. C. M.
 Robert & Société de Construction J. C., S. C. M.
 Ryder & Vaughan, S. C. Iberville.
 Sauvé & Veronneau, S. C. M.
 Serrurier Lallemand & Mercier, S. C. M.
 Serrurier Lallemand & Mercier, S. C. M.
 Shaw & Mackenzie, S. C. M.
 Smith & Cassils, S. C. M.
 Snowdon & Nelson, S. C. M.
 Société de Construction & La Banque Ville Marie, S. C. M.
 Soc. de Construction & La Banque Nationale, S. C. M.
 Société de Construction & Robinson, S. C. M.
 Soc. de Construction Montarville & Cousineau, S. C. M.
 S. E. Railway Co. & O'Halloran, S. C. M.
 Swords & Miller, S. C. M.
 Thomson & Watson, S. C. M.
 Union Bank of L. C. & Ontario Bank, S. C. M.
 Vezina & N. Y. Life Ins. Co., S. C. M.
 Wanless & Montreal Building Society, S. C. M.
 Wilson & City of Montreal, S. C. M.

In the following cases, the decision of the Court below was reversed :—

Beaudry & Curé & al. of Montreal, S. C. M.
 Boyer & Barthe, S. C. Richelieu.
 Bruneau & Barnes, S. C. M.
 Carreau & McGinnis, C. C. Iberville.
 City of Montreal & Dugdale, S. C. M.
 Clark & Exchange Bank, S. C. M.
 Darling & Barsalou, S. C. M.
 Dixon & Perkins, S. C. M.
 Duhaime & Ayotte, S. C. M.
 Grenier & City of Montreal, S. C. M.
 Holmes & Mutual Fire Ins. Co., S. C. St. Francis.
 Hood & Bank of Toronto, S. C. M.
 Kane & Racine, S. C. M.
 Kane & Wright, S. C. M.
 Larue & Loranger, S. C. M.
 Lussier & Corp. of Hochelaga, S. C. M.
 McCaffrey & Claxton, S. C. Bedford.
 McGauvran & Stewart, S. C. M.
 Martin & Poulin, S. C. M.
 Mattinson & Cadieux, S. C. M.
 Montreal Cotton Co. & Corporation of Valleyfield, C. C. Beauharnois.
 Morgan & Coté, S. C. M.
 Provost & Bourdon, S. C. M.
 Rolfe & Corporation of Stoke, C. C. St. Francis.
 St. Louis & Shaw, S. C. M.
 Thibaudeau & Beaudoin, S. C. M.
 Trust & Loan Co. & Dupras, S. C. Terrebonne.
 Valois & School Commissioners of Hochelaga, S. C. M.
 Villeneuve & Graham, S. C. M.

SUMMARY.

Confirmed..... 87

Reversed..... 29

116

It appears from the above that in exactly three-fourths of the cases judgment was confirmed, and in one-fourth the judgment was reversed.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, Feb. 9, 1881.

DORION, C. J., MONK, RAMSAY, BABY, CARON, JJ.

LAW (deft. below), Appellant, and FROTHINGHAM (plff. below), Respondent.

Sale of Real Estate—Incumbrance—Clause of "franc et quitte."

Satisfaction of the clause of "franc et quitte" by the vendor of real estate, where the deed contains such clause, is a condition precedent to bringing an action for the purchase money, or for any portion thereof.

The appeal was from a judgment of the Superior Court, Montreal, Sicotte, J., July 8, 1878, by which the respondent's action was maintained.

The action was brought to recover the sum of \$3,582.87, amount of instalment and accrued interest, due Feb. 15, 1876, under a deed of sale of real estate from G. H. Frothingham and co-heirs (now represented by the respondent), to the appellant. The price was 60 cents per foot, at which rate the purchase money amounted to \$20,185.20, payable in instalments. The appellant had paid two of the instalments, but objected to pay the third.

The defence was that by the deed of sale referred to, the vendors had sold the property in question "free and clear of all incumbrances whatsoever, save and except a vendor's privilege for \$5,250 in favor of the heirs McKenzie," which the vendors undertook to pay, and have a discharge duly registered; that the purchase money was only payable subject to the fulfilment by the vendors of their covenant to remove the incumbrance, and that they had failed to do so. By another plea the appellant

alleged that he had suffered damage to the extent of over \$4,000, by not being able to carry out a sale which he had made to John Lewis at an advance of 35 cents per foot, and that the instalment sued for was compensated by the larger amount of damage.

The Court below sustained the action for the reasons which follow:—

"Considérant que les vendeurs ont, par l'acte même, dénoncé à l'acheteur les hypothèques et charges qui grévaient le terrain vendu au défendeur, et se sont chargés de les acquitter;

"Considérant qu'il est constant que le défendeur doit, outre et en sus du paiement réclamé par l'action, une somme excédant \$10,000, productive d'intérêt à sept pour cent, et que l'hypothèque qu'il dénonce n'est que de \$5,250;

"Considérant que cette hypothèque est une substitution au profit des héritiers McKensie, dénoncée par la vente, et que l'acheteur connaissait le caractère et la nature de cette dette, qu'il n'est pas dans la puissance des vendeurs de payer et acquitter à volonté;

"Considérant que le défendeur est mal fondé à demander à garder son prix entre ses mains, tant que les vendeurs n'auront pas acquitté cette dette et purgé cette substitution;

"Considérant que le défendeur est aussi mal fondé dans sa réclamation pour dommages résultant du profit qu'il aurait fait en revendant partie du terrain acheté, et qu'il n'a pu réaliser faute de pouvoir obtenir le consentement de l'acheteur qu'il indique, tant que cette hypothèque et substitution ne serait pas purgée;

"Considérant que le défendeur ne peut que demander à différer le paiement du prix à raison du péril d'éviction, et qu'attendu la dénonciation de la dette et hypothèque par le contrat de vente, il a suivi la foi et la solvabilité des vendeurs;

"Considérant que le défendeur doit encore sur le prix au-delà de \$10,000, payables annuellement avec intérêts de sept par cent, et qu'il a entre ses mains une somme plus que suffisante pour le garantir contre les périls d'éviction;

"Considérant d'ailleurs que le défendeur ne demande pas la caution contre les périls d'éviction, mais purement le débouté de l'action, et que sa dette soit compensée par les dommages sus-mentionnés, déclare le défendeur mal fondé dans ses défenses;

"Condamne le défendeur à payer au demandeur la dite somme de \$3,582.87, avec intérêt," etc.

In appeal, CARON, J. *ad hoc*, (*diss.*) was of opinion to confirm the judgment, on the grounds stated therein. His Honour referred to the case of *McDonnell & Goundry*, 22 L. C. J. 221, in support of his view.

The majority of the Court were for reversing the judgment. The following opinion was by

RAMSAY, J. This case appeared to me at first to be one of extreme simplicity, but now with elaborate reasoning, questions of practice, precedents of this Court said to be contradictory of the decision rendered in this case, and citations from codes, it assumes another aspect.

The action was brought to recover one instalment of purchase money due on a deed of sale by respondent to appellant, with interest. The defence to the action was that the deed of sale contained the clause of *franc et quitte* save one incumbrance which respondent bound and obliged himself to remove and to have the discharge enregistered. This has not been done. Respondent says that this clause meant "that the vendors should pay off the said mortgage as soon as it was practicable or possible so to do;" and that it was not practicable so to do because by a deed which appellant knew the existence of, the incumbrance—a constituted rent—was substituted and that the substitution was not yet open.

Of course every deed that stipulates a condition means that the condition must be possible, that is, not physically impossible, or contrary to law and good morals. But the undertaking to pay off a *bailleur de fonds* claim is not impossible. By itself it is perfectly possible, although the person undertaking may be unable from some act of his own to perform the obligation. Frothingham *s'est fait fort* to pay off the claim and he was bound to do it. If however it were otherwise, I think the repayment of the *rente constituée* is not rendered impossible even for Mr. Frothingham—that is, there is not even a relative impossibility. The authority of Pothier is clear and precise. See *Const. de Rente*, No. 51, cited at the bar, and No. 91, where the doctrine is repeated. It is true the object of the law, to prevent the loan of money at interest, was the cause of this strict doctrine, and the usury laws being done away with, it may

perhaps be said that the cause of the law having disappeared, the law also has ceased. But I don't think the *brocard* can be so applied, as to create an embarrassment of this kind. It might perhaps have been argued that the deed from MacKensie to Frothingham constituted a *rente viagère*, but both parties seem to agree that it created the substitution of a *rente constituée*, and they are probably right. For my part I don't think it would affect the case as it comes before the Court.

There was another point made at the argument, and as it seems to have been the one on which the judgment of the Court below turned, it is right to notice it. It was said that appellant had plenty of security in his hands even after he paid this instalment. It is not a question of security but of contract. Respondent promised to remove the encumbrance, he cannot now tell appellant that he wanted something else, with which he ought to be satisfied. I therefore think the judgment must be reversed in so far as it maintains the action for the instalment.

By the second plea there is a claim by appellant for damages for failure on the part of respondent to fulfil his bargain, which, it is prayed, may be set off against the balance of purchase money due. That is rather a contradictory conclusion. Defendant says he won't pay the instalment because it is not due owing to the omission of plaintiff, in one plea, and in another he says he will pay it provided he may do so by offering damages to be paid as a set off. There is another objection, I don't think the liability is proved. Respondent had a certain thing to do, he was only pressed to do it when Lewis refused to take the deed, and then the damage was done. I would, therefore, reject the demand of damages by the plea.

It has been said by the learned Judge who dissents, that the first plea of the appellant should have been pleaded as a preliminary plea, and he quotes article 120, 2ndly, C. C. P. That article only says that such a plea *may* be pleaded as a dilatory exception,—a disposition we are not likely to interpret by turning "may" into "must."

Allusion has been made to two cases of *Goundry & MacDonnell*, and it is contended that we there held that where there was the clause of *franc et quitte* the vendor could re-

cover the price of the purchase money. That is not what was held. I remember the case very well. The first instalments were sued for in the District of Beauharnois. The cases came before me and I dismissed one of the actions because there was no certificate of the Registrar filed according to the terms of the deed, and I maintained the other as it did not appear there was any incumbrance. It is not easy to give a more complete effect to the stipulation of a deed than this. Two other cases then came before us, which had been managed with more care, and the sole question was as to whether there was an incumbrance within the meaning of the clause of the deed. Two of the Judges were of opinion that there was. The majority of the Court held that there was only a right of way, which could be localised, and that only gave right to an action *quanto minoris* and a reduction of the price, and that plenty of money remained to satisfy such reduction. The whole Court, therefore, affirmed the same principle that we are applying now, namely, that satisfaction of the clause of *franc et quitte* was a condition precedent to bringing an action for the purchase money.

NORE.—It has been suggested to me since delivering the above opinion, that we had perhaps omitted to allude to a point in the case, namely, interest. I cannot plead guilty to having made any omission. At the argument there was no question of interest urged on our attention, other than interest after demand in justice for money due. As we declared the money was not due, we had no question of interest before us. Had there been such an argument, it would not probably have modified the judgment. By our law, interest is only due by stipulation or from the time of a judicial demand, with a few exceptions, none of which covers the failure to do of the creditor. In this case there was no stipulation that interest should run on the purchase money while respondent delayed to fulfil his obligation, and certainly interest could not be deemed to run from the demand of money which is not due. Arts. 449 and 1077. I do not mean to say that the purchaser does not owe anything to the vendor on a special action, but certainly he does not specially owe interest. Interest on the purchase money may in some cases be a fair equivalent for the use of the property; but it would be to make a practical

blunder to assume that it was so in a case like the present, when it appears that the property was purchased at a large price for speculative purposes, for which it could not be used owing to this encumbrance. This is the true meaning of Art. 1534 2ndly, when interest runs, but it has no application whatever to sales with the clause of *franc et quitte*, or where there is a condition of a similar character. The appellant only failed to recover damages for the delay, because he had not put the respondent *en demeure* before the Lewis transaction arose, and he showed no other damage. [Note by Mr. Justice Ramsay.]

The judgment in appeal is recorded as follows :—

“ Considering that by the deed of sale of the 20th February, 1874, the respondent and his co-heirs declared that the immoveable property sold by them to the respondent, and described in the said deed, ‘ was free and clear of all incumbrances whatsoever, save and except a vendor’s privilege for \$5,250 in favor of the heirs McKenzie,’ which the vendors undertook to pay and have a discharge thereof duly registered ;

“ And considering that long before the institution of the present action, the respondent and his co-heirs have been requested to remove the said incumbrance in favor of the heirs McKenzie, but have failed to do so ;

“ And considering that under the stipulation contained in the said deed of sale, the respondent as representing the vendors cannot recover from the appellant any portion of the price of sale until he shall have removed the said incumbrance according to the terms of the said sale ;

“ And considering that there is error in the judgment rendered by the Superior Court at Montreal, on the 8th of July, 1878 ;

“ But considering that the appellant has not proved that he had suffered any damages by the non-removal of the said incumbrance ;

“ This Court doth reverse the judgment of the said Superior Court of the 8th of July, 1878, and proceeding to render the judgment which the said Superior Court should have rendered, doth dismiss the action of the respondent *quant à présent*, and doth condemn the said respondent to pay to the appellant the costs incurred as

well in the Court below as on the present appeal. (Hon. Mr. Justice Caron dissenting.)"

Judgment reversed.

Lunn & Cramp for the Appellant.

Abbott, Tail, Wotherspoon & Abbott for the Respondent.

COURT OF REVIEW.

MONTREAL, NOV. 30, 1880.

TORRANCE, RAINVILLE, LAFRAMBOISE, JJ.

[From S. C., Montreal.

ROBIDOUX v. LÉPINE dit LEGRIS.

Succession — C. C. 2613 — Retroactive effect — Acquired Right.

The judgment inscribed in Review was rendered by the Superior Court, Montreal, Jetté, J., July 8, 1880, maintaining the plaintiff's action.

RAINVILLE, J. Les faits de cette cause sont bien simples et ne sont pas contestés par les parties; mais la question de droit qu'on y soulève est de la plus haute importance; il s'agit de la rétroactivité de la loi: question d'autant plus importante que nous ne faisons que commencer à faire l'application de ce grand principe consacré par toutes les législations et reproduit si laconiquement, mais avec tant de précision par le C. N.: "la loi ne dispose que pour l'avenir; elle n'a point d'effet rétroactif."

Le 25 Février 1862, le fils du défendeur contracta mariage avec Dlle Bourdon, et par le contrat de mariage le défendeur fit don au futur époux d'une somme de \$200 et d'une propriété, avec stipulation que les dits biens seraient propres au dit futur et aux siens de son côté, estoc et ligne.

De ce mariage est née une fille, Hosanna: le père est mort en 1863, et la mère s'est remariée et a eu plusieurs enfants frères et sœurs utérins de la fille Hosanna Lépine dit Legris. Cette dernière est morte en 1878, laissant son grand père, le défendeur, et sa mère et ses dits frères et sœurs.

Si la mort de cette jeune fille était arrivée avant la mise en force de notre Code, le défendeur aurait recueilli les biens par lui donnés non pas en vertu du droit de retour légal (lequel ne peut être exercé dans la succession des enfants du donataire, décédés sans postérité, Chabot, art. 747, No. 12); mais en vertu de la dite sti-

pulation de propres, et l'action devrait être renvoyée.

Si cette succession, ouverte depuis notre Code, doit être réglée par les principes de l'ancien droit le défendeur devrait encore être absous.

Si au contraire cette succession doit être réglée par les dispositions de notre Code, le défendeur n'a aucun droit à ces biens. C'est la mère et les frères et sœurs de la défunte Hosanna Lépine qui doivent recueillir sa succession, et le demandeur qui est aux droits de la mère devra réussir.

La question est donc de savoir si cette succession doit être réglée suivant les règles de notre ancien droit ou d'après les dispositions nouvelles de notre Code: pour résoudre cette question il s'agit d'interpréter l'art. 2613.

Les lois en force, dit cet article, lors de la mise en force de ce Code, sont abrogées dans les cas: (et on énumère les cas.) "Sauf tous jours qu'en ce qui concerne les transactions, matières et choses antérieures à la mise en force de ce Code, et auxquelles on ne pourrait en appliquer les dispositions sans leur donner un effet rétroactif, les dispositions de la loi qui, sans ce Code, s'appliqueraient à ces transactions... restent en force et s'y appliquent..."

Donc on reste sous la loi ancienne si en appliquant les dispositions du Code "on leur donne un effet rétroactif. Mais par contre, et la conséquence est d'une logique mathématique, on tombe sous l'empire du Code si en en appliquant les dispositions on ne leur donne pas un effet rétroactif."

En d'autres termes, mais d'une manière moins claire et moins concise, notre art. 2613, n'est que la reproduction de l'art. 2 du C. N. "La loi ne dispose que pour l'avenir; elle n'a point d'effet rétroactif."

Quand donc y a-t-il rétroactivité?

Lorsqu'on ne pourrait appliquer une loi qu'en enlevant à un citoyen un droit qui est dans son domaine. C'est là ce que la doctrine appelle un droit acquis.

1 Laurent No. 163.

Qu'est-ce donc qu'un droit acquis?

C'est ici que s'ouvre la discussion que commencent les divergences d'opinion: "Les droits acquis, dit Merlin (Rep. Vo. Eff. rétroact. s. 5, §1 No. 5) sont donc ceux qui sont entrés dans

notre domaine, et que ne peut plus nous ôter celui de qui nous les tenons."

"Ajoutez, dit Mailher de Chassat p. 158, No. 12, que ces choses ne sont réellement entrées dans notre domaine, que lorsqu'elles peuvent devenir l'objet de transactions civiles."

"Un droit acquis, dit Meyer, Q. transit. p. 17, suppose que ce droit est devenu la propriété de celui qui l'exerce."

On entend par *droit acquis*, dit Chabot, ceux qui étaient irrévocablement conférés et définitivement acquis avant le fait, l'acte ou la loi que l'on veut opposer pour empêcher la pleine et entière jouissance de ces droits. Chabot de l'Allier, Q. Trans. Vo. Dr. acquis, vol. 2 p. 88.

Le principe qui domine en cette matière de la rétroactivité est que le droit acquis ne peut jamais prendre naissance par l'effet seul de la loi ; il faut un fait de l'homme :

"Les avantages concédés par la loi seule, disent Aubry et Rau (Vol. 1 § 30 p. 68), "ne forment que simples expectatives, tant que l'événement ou le fait auquel elle en subordonne l'acquisition ne s'est point réalisé, et sont jusque-là susceptibles d'être enlevés par une loi postérieure."

Les droits qui prennent naissance dans un fait de l'homme constituent des droits acquis. Tels sont les droits naissant des contrats, des quasi-contrats, des délits et des quasi-délits.

Par contrats, on doit entendre ici, non seulement les conventions expressément formées entre les parties : mais encore les dispositions légales que dans telles circonstances données, elles sont légalement présumées avoir adoptées. C'est ce qui a lieu notamment lorsque les époux n'ont pas réglées d'une manière formelle leurs conventions matrimoniales. C. N. art. 1387, C.C.B.C. art. 1270. Chabot, Vo. Dr. acquis, vol. 2, p. 90. 1 Aubry & Rau l. cit. p. 70. 1 Laurent, No. 210.

Mais il faut remarquer, pour l'exacte application de ce principe, que c'est toujours à la question de savoir si la loi s'applique comme loi ou comme contrat qu'il faut s'attacher.

1 Mailher de Chassat, p. 165, No. 3.

Mais pour qu'il y ait *convention tacite* basée sur l'intention probable des parties qui contractent, il faut des personnes existantes capables de contracter, ou de recevoir par donation, ou par testament ou par succession.

Ainsi, le douaire ou les gains de survie établis en faveur de la veuve ou du survivant des époux, par la coutume ou par la loi en vigueur lors de leur mariage, continueraient de subsister, malgré la survenance d'une loi nouvelle qui ne contiendrait plus de dispositions de cette nature, parce qu'il y a eu *convention tacite* entre les époux, laquelle a constitué un droit acquis. 1 Aubry & Rau, § 30 p. 71. Merl. Vo. gains de survie § 2. 1 Laurent, No. 212.

C'est donc en nous assurant constamment, dit Mailher de Chassat, (vol. 1 p. 173 No. 7) que les dispositions de la loi sont converties en contrat tacite par les parties, que nous sommes sûrs de trouver les *droits acquis* auxquels ne peut porter atteinte la loi postérieure ; et c'est ce principe qui nous aidera à résoudre la question de savoir si le "raisonnement qui vient d'être employé relativement au douaire ou aux autres gains de survie de l'un des époux, dans l'hypothèse précédente, est applicable au douaire des enfants. Il est évident que non ; et quelle en est la principale raison ? C'est qu'il n'existe pas, et ne peut pas même exister de *droits acquis* à leur égard : le contrat tacite ne pouvant pas être supposé de la part d'enfants qui n'existent pas. Telle est l'opinion de Merlin rapportée ainsi en forme de résumé par Chabot, Q. trans. Vo. Douaire Coutum. vol. 2 p.

"Les deux arrêts invoqués par les défendeurs, disait Mr. Merlin, dans ses conclusions, ont bien décidé que, pour les époux entre eux, les dons statutaires avaient la même force que les dons conventionnels, mais ce principe n'est pas applicable aux enfants, parce qu'on ne peut pas dire qu'il y ait eu, relativement à eux, lors du mariage du père et de la mère, *convention tacite*, puisqu'ils n'existaient pas." V. Chabot, Vo. Douaire des enfants.

C'est d'après les mêmes principes que l'on a décidé sous le C. Nap. la question de savoir si les droits de masculinité et de primogéniture et les droits de retour successif devaient être réglés par la loi ancienne ou la nouvelle. C'est une maxime certaine en législation que toute succession *ab intestat* doit être régie par la loi existante au moment où elle s'est ouverte. Il en résulte que les mâles et les aînés qui avaient autrefois certains droits de primogéniture et de masculinité ne peuvent plus les réclamer si la succession s'est ouverte sous l'empire du Code, puisque la loi (C. N. art. 732 et C.C.B.C. art.

599) ne considère ni la nature ni l'origine des biens pour en régler la succession. Cependant si antérieurement au Code, il y avait eu des contrats qui eussent *légalement* conféré à des mâles ou à des aînés le droit irrévocable de recueillir certaines espèces de biens dans des successions à échoir, ces contrats devraient produire leurs effets, lors même que ces successions ne s'ouvriraient que sous l'empire du Code, *pourvu néanmoins que les mâles et les aînés qui auraient été avantagés, eussent stipulé personnellement ou par fondés de pouvoir, dans les actes, pour accepter les avantages à eux conférés.* Chabot, Vo. Droits de Masculin. et de primogéniture, 2 p. 94. Ce qui aurait lieu dans les cas où les parties avantagées n'acceptant pas personnellement pourraient être représentées par leurs pères ou ascendants suivant les arts. 303 et 889 de notre Code.

Mais si le droit avait été conféré généralement à tous les mâles ou à tous les aînés, nés ou à naître, pour être transmis héréditairement de mâles en mâles ou d'aînés en aînés, ce qui serait une véritable substitution fidéi-commissaire qui a été annulée par les lois nouvelles (il en serait autrement sous notre Code s'il y avait substitution, car elle est permise, mais dans la présente cause on ne saurait prétendre et on n'a pas prétendu qu'il y a substitution); ou si les mâles ou les aînés au profit desquels le droit aurait été constitué *n'avaient pas stipulé dans le contrat, pour en accepter valablement la donation*; dans tous les cas enfin où il n'y aurait pas eu *convention expresse et irrévocable avec les donataires eux-mêmes*, comme le droit ne pourrait être réputé *conventionnel*, et ne serait exigible qu'en vertu de la disposition de la coutume, il est certain qu'il n'y aurait pas lieu de l'exercer dans une succession ouverte sous l'empire du Code. Chabot, loc. cit. p. 95. Et il cite un arrêt de cour de cassation qui a consacré cette doctrine. Cet arrêt a été rendu sur le réquisitoire de Merlin, alors proc.-général. Il s'agissait de la stipulation de transmission des droits à un bail emphytéotique aux héritiers mâles du preneur et du droit de retour au bailleur.

Il y a, dit Merlin, une grande différence entre le droit du bailleur au retour des biens, et le droit des descendants mâles du preneur à la succession de ces mêmes biens.

Le droit du bailleur au retour de ces biens est fondé sur un contrat dans lequel il a été partie, et ce contrat ne peut être violé ni altéré à son préjudice.

Le droit des descendants mâles du preneur à

la succession de ces mêmes biens, n'est qu'une expectative, qu'une espérance, qui se sont anéanties lors de la promulgation du Code; en d'autres termes, ils n'avaient pas de *droits acquis*. Car ni les descendants mâles ni leur auteur n'ont été parties dans le contrat de bail emphytéotique: ce contrat n'a été passé qu'entre le bailleur et le preneur; il n'a donc pas donné *plus de droits aux descendants mâles que n'en a donné aux parents collatéraux d'une femme mariée sous l'empire des anciennes lois*, la clause par laquelle en se mariant, celle-ci a stipulé une somme d'argent, *propre aux siens de son côté et ligne*; et de même que, nonobstant cette clause, la somme ainsi stipulée *propre*, serait dans une succession qui s'ouvrirait aujourd'hui, déferée à l'héritier désigné par le Code Civil, de même aussi c'est à tous les héritiers en général du preneur décédé depuis le Code que doivent appartenir les biens concédés en emphytéose à leur aïeul commun.

Chabot, loc. cit. p. 102 et 103. Et le même Chabot, Vo. Propres, § 2, pose carrément la question qui nous est soumise en cette cause: "Les propres *conventionnels*, c'est-à-dire les biens meubles, auxquels on avait attribué la qualité de propres, par des conventions particulières, ont-ils conservé cette nature dans les successions ouvertes sous l'empire du Code, ou doivent-ils être également partagés, comme tous les autres biens, entre les héritiers appelés par les dispositions du Code?"

Et il répond négativement à la première partie de la question, et comme conséquence affirmativement à la seconde.

C'est d'après les mêmes principes que l'on a décidé la question du droit de retour, et l'on distinguait entre le retour légal et le retour conventionnel: dans le premier cas, le droit de retour était réglé d'après la loi existante lors de son ouverture; dans le second cas, savoir dans le cas de stipulation de retour, c'était d'après la loi existante lors de sa constitution.

En effet, d'après notre droit coutumier, le retour légal n'était qu'un droit successif, et si ce droit s'ouvrait sous l'empire du C. N. il n'avait plus d'effet, et les héritiers indiqués par ce Code recueillaient les biens donnés et non le donateur.

Il en était autrement dans les pays de droit écrit dans lesquels le retour légal ne constituait pas un droit successif, mais un droit de révocation, et avait le même effet que le retour conventionnel. Et dans ce dernier cas, c'est la loi du temps où la stipulation a eu lieu qui en règle les effets parce qu'elle constitue alors un *droit acquis*. 3 Chabot, Vo. Retour, § 2, 3, 4, 6, 7, 8, 9 et 10. Merlin, Rep. Vo. Retour, s. 2, § 2, art. 3, No. 8. 1 Mailher de Chassat, p. 403 et 404.

Le jugement, qui a donné gain de cause au demandeur, doit donc être confirmé.

Judgment confirmed.

Robidoux for plaintiff.

Doutre & Co. for defendant.

The Legal News.

VOL. IV.

MARCH 5, 1881.

No. 10.

OUR SUPREME COURT.

Judicial organization has always been a source of disquiet in Lower Canada. Two causes have contributed to this. In the first place the mixed population has given rise to different views on the subject. The French mind, more given to logical system, seeks to obtain the nearest possible approach to truth, by referring legal disputes to the arbitrament of a number of specially trained judges; while the English mind hopes to attain the same end by dividing the scientific from the unscientific part of the matter, leaving the former to be decided by one or three judges, and the latter by persons totally unskilled in legal technicalities. To a French jurist a court of five or six judges is scarcely imposing, to an Englishman a court of four judges is suggestive of a committee. There may be exaggeration in both views; but it is not the object here to consider their respective merits. The difference is only referred to as one of the causes of our extreme sensibility about judicial systems. The second cause is more substantial. Lower Canada has never had a satisfactory final appeal. This seems a very terrible thing to say, but it must be followed by what is still more terrible, and that is, that it never can have one that will be perfectly satisfactory. The Privy Council appeal was and is a political necessity; and, as such, its decisions have been received with a certain kind of deference, greater perhaps than their intrinsic merits deserved. It is, in form at least, the decision of the Sovereign, on the advice of the first lawyers in England, and people readily believed that, though lacking a technical knowledge of the civil law, as preserved in the French system, the Lyndhursts, St. Leonards and Wensleydales could hardly make any very serious mistake. The old judicial committee had then something more than *prestige* to make up for its very obvious defect. The alteration in its composition, by the appointment of paid councillors, has, at any rate, destroyed its *prestige*. It would be

invidious to carry the comparison further. It would also be unnecessary, for the present composition of the judicial committee was devoted to destruction from its birth. As the paid councillors die off, or retire, their duties are to be performed by Lords of Appeal in Ordinary, so that, sooner or later, we shall have an appeal, not inferior in quality, whatever that may be, to that accorded to litigants in the British Isles. It would remove a grievance, perhaps more theoretical than real, if all the judicial functionaries in the colonies were not expressly declared to be ineligible as Lords Ordinary. Might not the accident of distance be considered protection sufficient against the inroad of a single barbarian? However, it is very hard for those, whose highest appreciations of legal literature are formed from reading Blackstone's commentaries, to believe we know any law at all: but then we are becoming a power in the state. It is only fair to the present judicial committee to add, that their diligence is indisputable, and that their opinions indicate care, and are readable, even when they are not sound.

Another great objection to the appeal to the Privy Council is its expense. Between the suitor and justice, lies open the insatiable maw of the English attorney, who bears very much the same proportion to the timid and conscientious gentleman who leads us through the labyrinths of legal proceedings here, as the man-eater of the jungle does to the domestic cat. To the objection of expense there is an answer of some practical weight: that costs discourage litigation, and that there is no other way of preventing the appeal courts from being clogged with cases than the wholesome terror of the taxing-master. This may be true, and applicable to some extent; but to a rich man or a powerful company, the fear of ruinous litigation frequently serves as a means of extorting from an indigent adversary a settlement which is not just, and, in any case, the costs of appeal to the Privy Council are so enormous as to be almost a denial of justice.

It was this question of expense that really created the Supreme Court. With all the constitutional difficulties before us, it seemed necessary to have an oracle nearer to us than Downing street, and one that would open its lips at a reasonable rate. Seeming necessities

are not always real ones, and the wise house-keeper only increases her establishment, as the judges decide, "after mature deliberation." We did not act as prudent house-keepers, when we saddled our establishment with the cost of the Supreme Court. To the Province of Quebec it is open to the same sort of objection as the Privy Council. Two-thirds of its members are as laymen when dealing with our civil law. A recent case in Ontario shows that the minority is not a protection for the special law of its Province. In *McKay v. Chrysler*, 3 Supreme Court Rep. 436, six judges of the Ontario courts, and the two representatives of the Ontario legal world in the Supreme Court, opined in vain against the votes of two judges from Quebec and of one from New Brunswick. This decision, it is true, marks the courage and honesty of the three; but the honesty partakes a little of the sort the cynic has styled in his own disagreeable way. Taken in the lump it is hardly less satisfactory than the concurrence under the deprecatory formula of: "I understand that by the law of the Province of —."

The dissatisfaction of Ontario and Quebec has manifested itself with considerable violence, and some reason. There is probably also a little prejudice to dilute the reason. A new court has to make its reputation. Eager for distinction, and untrammelled by any jurisprudence of its own, its action is apt to be volcanic. Time cures the prejudice of the bar, and experience tames the enterprising spirit of the court. But while all these different causes of dissatisfaction are in full force, we must expect angry denunciation, and we must be prepared not to be swept away by it. Mr. Girouard's bill is a well-intentioned suggestion to do away with some of the objections to the Court. It has, however, a great fault. The line of demarcation he proposes for the jurisdiction of the Court is extremely uncertain. Again, it deprives the country of the whole value of a general Court of Appeal, save for criminal cases, constitutional questions, and the decision of contested Dominion elections, and it maintains all the expense of the Court. Surely, if we want a central court for no other purpose than to give uniformity of decision to such a trifling number of cases, some other expedient could be devised for their adjudication, than

having six judges at seven thousand dollars a year.

The establishment of the Court was premature, and the selection of its members by many is considered unfortunate; but it would scarcely be an exhibition of political wisdom to abolish the Court, or to destroy its jurisdiction over the civil law of the Province, until it is made perfectly clear that it fails to perform its functions. This can only be decided by a fair trial. That is to say, by the consideration of the arguments in support of its judgments during a considerable time. If they are manifestly better than those of the Courts from which the appeals lie, the count of noses, even judicial, does not signify much: if the arguments of the judges are not good, their higher salaries and scarlet robes will not give their dicta authority, or preserve the Court from destruction. It is too late for abstract reasoning as to whether such a court ought, or ought not to be. It exists, and the test must now be results. The judges have a right to be so judged, but they must make up their minds to be ready for this issue. There is one way members of Parliament can help the Court, and it is by showing the government that the nominations to so high an office are not to be used to get out of a political difficulty, or to serve party and family jobs.

R.

AMALGAMATION OF FRENCH AND ENGLISH SYSTEMS OF LEGAL PROCEDURE.

In the Province of Quebec there has been, especially since confederation, a growing sense of *desideratum* of something of the kind; but, from causes incidental to her position as one of isolation in the matter of internal law, viz., civil law, and legal procedure, and from the rather pronounced—*exempli gratia*, Mr. Blake's speech in the House the other day, on the relative merits of the English and French systems of law in general—rather pronounced, we say, contempt of Quebec law, its judges, bar, and every branch of its administration, the initiative in that direction has yet to be taken. Each bar is, of course, naturally wedded to its system; but, at the same time, it is conceded on all hands, that there are faults and defects in all

the systems of legal procedure throughout our Dominion, somewhat varied in this regard. We do not propose, at present, to discuss the question, for the subject is large, and the points multitudinous, but our attention has just been called to it by the following official report of such a work having just been done by a fellow Canadian, a member of the Quebec Bar, Chief Justice Armstrong, who holds the singular honor of two Chief Justiceships, viz., of St. Lucia, and of Tobago, Islands in the West Indies, under two different systems of law, viz., the former under old French law, as at date of surrender (1803), and the latter under the law of England, each as amended and supplemented by special imperial legislation. His Honor had, as ancillary to his Civil Code, which is based principally on that of Quebec, and embodies as fully as possible the commercial law of England, undertaken to frame a Code of Civil Procedure for the Island. Having an essentially English Bar to contend with in the work, and a markedly insular Attorney General to battle with, the task has been evidently one of special difficulty, requiring an eliminating alembic faculty of the judicial mind, which does honor to the school (*French Canada*) where trained. The report runs thus, as we find it in the Colonial Blue Book for 1878-9, but really also for 1880, (C. 2730.)

The Governor of St. Lucia reports: "The Code of Civil Procedure referred to in the last named Ordinance has been prepared by Chief Justice Armstrong, and is a work of much labor and thought. It is the sister Code to the 'Civil Code of St. Lucia,' which came into force on 20th October, 1879, and will, when it comes into operation, make that measure complete. This valuable Civil Code has placed the law of the Colony in civil matters on a true and solid foundation, and has for ever set at rest the conflict of French and English law. It is a clear, concise and comprehensive work, and has received the unqualified approval of Her Majesty's Government." Sir Michael Hicks-Beach (then Secretary of State for the Colonies,) in conveying Her Majesty's gracious approval of the Code, added: "And I have to express my congratulations to the Colony of St. Lucia upon the achievement of so important a work."

We have seen the Civil Code in question, and

have read it sufficiently to seize its chief modifications. They are numerous, and would on some points be an improvement even to ours. The other work, technical, and involving difficulties, problems hitherto unsolved, we have had some inkling of, and it, certainly, is the more difficult of the two. Not having seen it since its completion we cannot, of course, pass on it, but shall do so as soon as we can.

M. M.

SLANDER.

In Vol. 3 of this journal, p. 67, reference was made to the case of *Simmons & Mitchell*, which had excited much interest in the West India Islands, and in which judgment had been rendered by the highest Court of the Windward Islands. That case was taken to the Privy Council, and on the 26th of November last, judgment was rendered dismissing the appeal. The Judicial Committee thereby affirmed the propositions of law stated by Chief Justice Armstrong (formerly of the bar of Quebec.) The principal question was whether the expressions used by Mitchell, being words of mere suspicion, were actionable *per se*. Chief Justice Armstrong held, first, that the words were not actionable *per se*; and, secondly, that a witness could not be heard to attach a meaning to words which were not ambiguous, unless a foundation were laid to show the animus of the speaker. The judgment of the Privy Council sustained this view, in opposition to the opinions of the Chief Justice of Barbadoes and the Chief Justice of St. Vincent, formerly barristers of the Middle Temple, and this, too, on a question more especially governed by the law of England.

THE LATE MR. L. CUSHING.

Among the younger members of the profession in Montreal, death could hardly have selected one who will be more keenly regretted than Mr. Lemuel Cushing, LL.D., who passed away on the 1st instant, at the early age of 39. Mr. Cushing was admitted to practice at the bar in 1865. For some time he represented Argenteuil in the House of Commons, but, with others, lost his seat by the operation of a new and stringent law on the subject of elections.

The deceased was a young man of liberal culture and considerable abilities, and had attained a respectable position at the bar. Personally, he was a gentleman of high and estimable character, and enjoyed the warm regard and affection of a large circle of friends. We mourn with them the premature interruption of a career of activity and usefulness.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTRÉAL, Feb. 2, 1881.

DORION, C. J., MONK, RAMSAY, CROSS, BABY, J.J.

EVANS et al. (plffs. below), Appellants, and McLEA et al. (dfts. below), Respondents.

Principal and Agent—Commission Agents whose principals resided abroad held personally liable on contract signed by them in their own name, though the contract showed their quality of Commission Agents, and it was known to the other party that they were selling goods to arrive from foreign principals.

The appeal was from a judgment of the Superior Court, Montréal, Johnson, J., Oct. 31, 1879, dismissing the action of the appellants. (See 2 Legal News, p. 370).

The action was by coal merchants, claiming damages because coal which they had purchased from the respondents had not been delivered to them.

In July, 1878, the respondents, J. & R. McLea, offered a quantity of coal for sale to the appellants, and, after some negotiation, a contract was entered into, dated Montréal, July 15, 1878, by which the respondents declared to have sold to Evans Brothers, the appellants, a cargo of Welsh anthracite coal, to consist of about 600 tons. It was proved that the appellants knew that the respondents were to get the coal from parties in Wales, and that it was to be shipped from there. Delivery was not made, and hence the action.

The defence to the suit was that the coal had been shipped, but the vessel had to put back, and it was impossible to deliver the coal as agreed. It was also pleaded that the respondents were commission agents, and were well known as such to the appellants; that they did

not transact with appellants on their own account, but as agents for Richards & Co., of Swansea, Wales, and that they were not at the time of the contract in possession of the goods sold.

The following is a copy of the contract:—

"Cable Address, McLea.

John B. McLea.

Robert P. McLea.

"J. & R. McLea,

"Commission Merchants and Ship Agents.

"Montréal, 15 July 1878.

"We have this day sold to Messrs. Evans Bros. of Montréal, a cargo of Welsh Anthracite Coals to consist of about 600 tons and to be shipped by sailing vessel, quality to be equal to their former purchases from us. Terms of sale, net cash on delivery. If purchasers wish to give a note at 3 or 4 mos. in payment of said cargo, we agree to take same providing interest be added at 7 1/2% per annum. Price of Coals to be four dollars per ton of 2,240 lbs.

"J. & R. McLEA."

Judgment was given in favor of the respondents in the Court below, the grounds being as follows:—

"Considering that it is pleaded by the defendants in substance that the said contract was not one that could bind the defendants personally, nor therefore render them personally liable to damages for not performing it, but that the real parties to the said contract were the plaintiffs on one side, and Richards & Company, of Swansea in Wales, on the other, who were perfectly well known to plaintiffs as the parties they contracted with as principals, the defendants being their mere agents and *mandataires*, and disclosing the name of their principals;

"Considering that the evidence in this case establishes in every respect the pretensions of the defendants, and that in the contract in question they were mere *mandataires* and not factors, not having possession of the thing sold, and that the case is to be governed by Article 1715, and not by article 1738 of the Civil Code, doth dismiss plaintiffs' action with costs."

DORION, C.J., with reference to the case of *Crane & Nolan* (19 L.C.J. 309), which had been cited in support of the judgment of the Court below, said the two cases were quite different. In the latter case the name of the principal was declared in the contract, and the agents signed as "commission agents" to show that they did not intend to bind themselves personally. In the present case the contract was signed in the name of J. & R. McLea, without disclosing any principal at all. The respondents must be held

personally, and the damages were proved. The judgment would be reversed, and the action maintained for \$600 damages.

The judgment is recorded as follows :

" Considering that on the 15th of July, 1878, the respondents sold to the appellants a cargo of Welsh Anthracite coal, to consist of about 600 tons, to be shipped by sailing vessel, at the price of \$4 per ton of 2,240 lbs ;

" And considering that, according to the understanding between the parties, the said coal was to be delivered on or about the 1st day of September, 1878 ;

" And considering that the said respondents have failed to deliver the said coal as per agreement, although requested so to do, and that the appellants have thereby suffered damages to the extent of at least \$1 per ton ;

" And considering that there is error in the judgment rendered by the Superior Court at Montreal on the 31st of October, 1879 ;

" This Court doth reverse the said judgment of the 31st of October, 1879, and proceeding to render the judgment which the said Superior Court should have rendered, doth condemn the respondents to pay to the appellants the sum of \$600 of damages, with interest from this date, and the costs," &c.

Judgment reversed.

J. A. A. Belle for Appellants.

L. N. Benjamin for Respondents.

COURT OF QUEEN'S BENCH.

MONTREAL, NOV. 17, 1880.

DORION, C. J., MONK, RAMSAY, CROSS, BABY, JJ.
PROVOST *es qual.* (oppt. below), Appellant, &
BOURDON, (contestant below), Respondent.

Correction of error in judgment—Costs.

By an opposition two of the three horses seized were claimed by appellant. Bourdon, the respondent, contested the opposition as to one of the animals claimed by the opposition. The judgment of the Superior Court, by error, dismissed the opposition altogether. The opposant appealed, contending that the opposition should have been maintained altogether, but in any case the clerical error in the judgment should be corrected.

In appeal the error was corrected, and each party was condemned to pay his own costs on

the appeal, the respondent not having desisted promptly from the part of the judgment which was in excess of his claim.

Judgment reformed.

Lacoste & Globensky for Appellant.

Prévost & Prétfontaine for Respondent.

COURT OF REVIEW.

MONTREAL, Feb. 28, 1881.

TORRANCE, RAINVILLE, JETTÉ, JJ.

CARTER V. FORD *et al.*

Sureties in appeal—Tender—Costs.

Appeal from judgment (reported in 3 Legal News, p. 412), rendered by the Superior Court, Montreal, Johnson, J, Dec. 15, 1880.

TORRANCE, J. The question here is one of costs only. The defendants being sureties in appeal, and liable for costs under their bond, on the 30th August, 1880, made a tender " on condition that if the judgment rendered in the said matter be reversed, the money will be returned to them who now pay as Molson's sureties." An action was immediately taken out and the defendants pleaded an unconditional tender, and made an unconditional consignment of the money with their plea. The Court has condemned them to pay the costs of the action, and of this they complain. They had no right to attach a condition to the tender. 1 Pigeau, p. 434, and J. Palais, A. D. 1880, p. 725. Moreover this condemnation to costs was in the discretion of the Court, and we should not, in the present case, interfere with this discretion. Judgment confirmed.

S. Bethune, Q.C., for plaintiff.

E. Barnard, for defendants.

SUPERIOR COURT.

MONTREAL, Feb. 24, 1881.

Before TORRANCE, J.

ARMSTRONG V. THE NORTHERN INSURANCE CO.

Fire Insurance—Claim not made within delay stipulated by the policy.

The demand was to recover, under a fire policy, for loss by fire.

The defendant pleaded a number of pleas.

1. That the plaintiff who claimed for her absentee husband, the owner of the property, had

no quality to claim. 2. That E. H. Bell, the party insured, had no insurable interest. 3. That it was a condition of the policy that unless the claim were made within three months after the fire, all benefit under the policy should be forfeited; that no claim was made within three months. 4. That an irregular, illegal claim made by plaintiff within twenty days after the fire was immediately rejected, and no action was taken within twelve months, and it was a condition that unless an action was taken within three months after rejection the claim should be forfeited. 5. That the claim was fraudulent.

TORRANCE, J. The court overrules the first and second and fifth pleas, but finds the third and fourth sustained by the evidence. The eleventh condition of the policy has not been complied with, and no waiver by the Company has been proved.

Action dismissed.

S. Pagnuelo, Q.C., for plaintiff.

Trenholme & Taylor for defendant.

SUPERIOR COURT.

MONTREAL, Feb. 24, 1881.

Before TORRANCE, J.

COURT *es qual.* v. WADDELL.

Calls on shares—Director—Informality—Waiver.

The plaintiff sought to recover from Mr. Waddell the sum of \$7,500, being the balance due on his subscription of 50 preferential shares in the Mechanics' Bank, including double liability. Since the action the defendant had paid \$2,500, reducing the claim to \$5,000.

Mr. Waddell pleaded that by 39 V., c. 42, s. 2, a by-law had to be passed authorizing the issue of the preferential stock, and that no such by-law was passed; and the Act could only have effect on acceptance by shareholders by resolution passed at a special general meeting of shareholders called for the purpose, and concurred in by at least two-thirds of the holders of paid-up stock present, and no such meeting was called or held. That no by-law by a qualified board of directors was ever passed authorizing the issue of the said stock; that at the date of said pretended issue, Charles J. Brydges, Walter Shanly, John Atkinson, Charles Garth and John Macdonald were Directors, and

Brydges, Shanly and Macdonald were not qualified, and any act by them was illegal. Moreover, that defendant was not liable for the additional calls pretended to be due under the double liability clauses of the Banking Act.

The plaintiff answered the pleas by alleging that Mr. Waddell had waived any irregularities which might have existed in the issue of the stock by paying the balance of original subscription since the institution of the action, and by acting as Director on such stock and holding himself out to the public as such Director.

TORRANCE, J. The facts of this case are simple. Mr. Waddell subscribed for 50 shares of the preferential stock of this institution and has paid it all. He has acted as director thereof for years. He drew a dividend on the stock. The ingenuity of his counsel has suggested the absence of a by-law by the shareholders, and the invalidity of the proceedings of the directors, owing to two of them not being properly qualified. The objection does not come with a good grace from one of the directors. The question here is his double liability as a shareholder. If he is not a shareholder of this preferential stock, he is an ordinary partner liable to the extent of his estate. This would be a much more serious alternative. The pleas are overruled, and judgment will be entered up for the balance unpaid.

Maclaren & Leet for plaintiff.

L. N. Benjamin for defendant.

SUPERIOR COURT.

MONTREAL, Feb. 24, 1881.

Before TORRANCE, J.

McNICHOLS *es qual.* v. CANADA GUARANTEE CO.

Official assignee—Surety—Liability of surety for default of official assignee acting under appointment of creditors.

The demand was against the defendant as surety for the late Alphonse Doutre for the due performance, fulfilment, and discharge of the duties appertaining to the office on employment of an official assignee for the electoral district of Montreal.

The declaration alleged the insolvency of one George L. Perry, and the appointment of Doutre as official assignee to the estate, and Doutre took possession on the 11th April, 1876, and

died on the 15th May, 1879; that plaintiff was then appointed assignee, and the sum of \$364.42 was found to be due to the estate of Hughes by Doutre.

The defendant pleaded that at the time when Doutre became indebted in the sum claimed from the surety, he was not acting in the character of an official assignee, or as an employee of the Crown or public officer, in which capacity only the defendants by their bond became responsible for his acts. That on the 9th of May, 1876, Doutre was appointed assignee for the creditors, and thereby ceased to act as an official assignee, and from that date the surety became freed from any liability for the future as to any acts or defaults of Doutre subsequent to that date.

TORRANCE, J. It is admitted that the indebtedness of Doutre arose after the 9th May, 1876, that is, after his appointment as creditors' assignee. In *Delisle et al. v. Letourneau*, Mr. Justice Johnson has already held (3 Legal News, pp. 207-8,) that the bond covered the defaults of the official assignee when acting as assignee of the creditors. On the other hand it has been held by Chief Justice Hagarty that the bond did not cover defaults of the creditors' assignee. The ordinary rule is that the obligation of the surety is *strictissimi juris, et non extenditur de persona ad personam*. If the case came up for the first time, the Court might possibly apply these rules in the present case, but the only reported judgment is that of Mr. Justice Johnson in this Court, and I deem it right to follow the case of *Delisle et al. v. Letourneau* until reversed by a higher court.

Judgment for plaintiff.

R. & L. Laflamme for plaintiff.

J. C. Hatton for defendants.

SUPERIOR COURT.

MONTREAL, Feb. 24, 1881.

Before TORRANCE, J.

TRENHOLM v. MILLS.

Damages—Dogs killed while trespassing.

TORRANCE, J. This was an action of damages by a farmer against his neighbor: 1st, for having shot a dog of his in August, 1879; 2nd, for

having shot another dog of his in June, 1880; and 3rd, for having fired shots into his building. The defendant pleads justification in part, tenders \$5 as the value of one dog, and denies the rest of the claim, which is for \$20.

The question is one purely of evidence. The Court is of opinion that Mills killed both dogs, and though the dogs were trespassers, he was wrong in taking the law into his own hands. The tender is insufficient. The Court assesses the damages as to the first dog at \$20; as to the second dog at \$30; and other damages, namely firing shots into the building at \$10, making \$60 in all.

Maclaren & Leet for plaintiff.

St. Pierre & Scanlan for defendant.

CIRCUIT COURT.

MONTREAL, Feb. 7, 1881.

Before CARON, J.

O'DOWD v. BRUNELLE.

Exemptions from seizure—Ball-dress.

Held, A lady's dress, described in the *procès-verbal* of seizure as a ball-dress, and admitted to be such, is exempt from seizure under art. 556, C. C. P. "The debtor may select and keep from seizure: (2) The ordinary and necessary wearing apparel of himself and his family."

Opposition maintained.

RECENT ONTARIO DECISIONS.

Fire Insurance—Misrepresentation—Incendiarism.

—Action on a fire policy dated May 21, 1879, on ordinary contents of a barn, which was at the time of the insurance empty, and on other articles of personal property. In the application for the insurance, dated May 13, 1879, plaintiff answered "No" to the question, "Is there reason to fear incendiarism, or has any threat been made?" At the trial it appeared that one M had threatened to beat the plaintiff, and the latter, being alarmed, had sent for the defendant's agent and had the premises insured, that he would not have insured but for his fear of M., and that he had sat up and watched for a week, and that he believed the premises had been set on fire, and that he had admitted this to an officer of the defendant's after the fire, which occurred Oct. 28, 1869. At the time of

the fire the barn contained some grain and hay, and a threshing machine, for the loss of which an action was brought. One of the conditions of the policy was, that if the assured "misrepresent or omit to communicate any circumstance, which is material to be made known to the company in order to enable them to judge of the risk," the policy would be avoided. *Held*, that the plaintiff could not recover, because, the insurance having been effected solely on account of his fear of M., the answer to the above question was untrue.—*Campbell v. Victoria Mutual Ins. Co.*, (Q.B.)

Breach of Promise of Marriage.—In an action for breach of promise of marriage, the evidence showed that the plaintiff who had been seduced by the defendant, had told her father that she was going to get married to the defendant; and that plaintiff's father had said to defendant "and you promised to marry her," to which the defendant replied, "I will marry her if it is mine." The jury found a verdict for plaintiff, with \$200 damages. *Held*, that the admission of the defendant, and the statement of the plaintiff to her father, her apparent acquiescence, coupled with her probable desire under the circumstances to bring about a marriage, were sufficient evidence to go to the jury, of a mutual agreement to marry, though there was no actual promise proved on plaintiff's part.—*Fisher v. Graham*, (C.P.)

Accident Policy—Death from voluntary exposure to unnecessary danger.—N., being insured with defendants against death by accident, was killed by a railway train in the yard of the Northern Railway Company at Toronto,—a place which it was unlawful for him, not being an employee of the Company, to enter, and into which he had unaccountably driven. He was last seen by a witness who watched him, driving over and among a network of tracks, and who, while he was entangled in a switch gate, warned him not to go farther or he would be killed, to which deceased made no answer. By certain of the conditions of the policy it was stipulated that it should not "extend to any bodily injury when the death or injury may have happened in consequence of voluntary exposure to unnecessary danger, hazard or perilous adventure, or of violating the rules of any company, etc., or while engaged in, or in

consequence of, any unlawful act." *Held*, that the plaintiff could not recover.—*Neill v. The Travellers Insurance Co.*, (C.P.)

GENERAL NOTES.

Mr. T. Bouthillier, formerly Sheriff of Montreal, died Feb. 28, aged 85.

The oldest notary of the Province of Quebec, Edouard Glackmeyer, is dead. Mr. Glackmeyer was admitted as a notary in 1815. He is said to have been also the oldest justice of the Peace in the District of Quebec.

The *Canada Law Journal* says: "The S.S. collar, lately worn by Lord Coleridge as Chief Justice of the Common Pleas, is said to be the same worn by Lord Coke. It may not be amiss here to mention, for the benefit of the unlearned in such matters, that the S.S. chain, or collar, worn as a distinctive badge of honor by the Chiefs of the English courts, is said, according to some old traditions, to be named from Sanctus Simplicius, a Christian judge and martyr of the time of Diocletian. It is usually passed down from retiring or deceased chief justices to their successors. Lord Coleridge, we presume, takes his Common Pleas S.S. with him to the Queen's Bench."

An interesting record of the Dartmouth College *alumni* shows that since the institution was chartered in 1769, diplomas have been issued to 4,275 young men. Out of the number there has been 1 chief justice of the United States Supreme Court, 2 members of the same court, 6 cabinet officers, 6 ambassadors of foreign courts, 16 senators in Congress, 65 representatives, 20 chief justices of courts, 163 judges, 23 governors, 18 presidents of State senates, 31 speakers of houses, 27 United States district attorneys, 4 attorney-generals of States, 5 judges of the United States Circuit and District Courts, 49 presidents of colleges, 3 United States consuls-general, 1 comptroller and 1 register of the treasury, 950 ordained ministers of the gospel, 1,196 lawyers, 382 physicians, 1 major general, 13 brigadier generals, 13 colonels, 13 lieutenant colonels, 12 majors, 2 adjutants, 33 chaplains, 33 captains. It appears from the above that more than one fourth of the total number of graduates became lawyers.

BRITISH COLUMBIA.

LAW SOCIETY.—The following resolution was unanimously passed at a large meeting of the Incorporated Law Society, held on the 5th inst. at the Secretary's office:—*Resolved*, That the Incorporated Law Society of British Columbia desire to express their thanks to the Hon. Mr. Walkem for the very able and satisfactory manner in which he has accomplished the difficult undertaking of compiling a new code of Supreme Court Procedure, and their appreciation of the immense amount of labor which, in spite of the grave and arduous duties of the Attorney-General, has been bestowed upon the Code—a work which will form the basis of all future civil practice in the Province.—*Victoria Standard*, Feb. 8th.

The Legal News.

Vol. IV. MARCH 12, 1881. No. 11.

CRIMINAL SENTENCES.

A good deal of criticism has followed upon Mr. Justice Stephen's sentence of one Henry Perry who, having first robbed his victim in a railway carriage, belabored him with a stick until he was insensible, and then endeavored to throw him out upon the line. The complaint is not of the sentence itself, but of the lecture which accompanied it, which was as follows:—

"Henry Perry—You stand convicted of one of the worst offences I have had the misfortune to try. Everything has been said that could be said for you, with the view to the propriety of proper pleading, and you have no one to blame but yourself for the position in which you find yourself. You obviously, beyond all possibility of doubt or question, wickedly premeditated the outrage which, for a young man in a respectable position, and, I suppose, a decent education, is almost unparalleled. It is perfectly clear to me, and to every one who heard what Lewis stated, that your distinct intention was to stupefy that person by the use of some narcotic, and then to rob him, and, when disappointed in the wicked expectation, and not being able to do that, you did, to the utmost of your force, use a stick with sufficient violence to make him insensible, and it is impossible for me to doubt that you did attempt to drag him to the door of the carriage and throw him out upon the line, whether you intended to cause his death or not. It may be that you had not formed a deliberate premeditated intention to murder him: but it is only too obvious that when you did commit that terrible crime and were thinking how you could avoid the consequences, you tried to throw him out of the carriage, in order that no being might find out that anything had taken place between you and him. I am willing to believe that your character has been a good one; but in this sense, like other criminals, you have had a good character until you have been found out. In the act of which you have been found guilty, you pose as the most cowardly, most brutal wretch that ever stood in the dock, and the sentence upon you must correspond with the severity of the crime you have committed, for I have a duty to perform, and the sentence of the court upon you is that you receive first thirty lashes with the instrument called the "cat"—(the prisoner up to this point had exhibited an apparently calm demeanor, but here burst into tears)—in order that, coward as you are, you may feel somewhat of the pain which you inflicted, and afterward, that you be kept in penal servitude for twenty years."

The prisoner, we are told, "on hearing the sentence, gave a scream, and was then removed

from the dock." The scream is a dramatic incident which seems to have disturbed the nerves of the critics. The *Chicago Legal News* says: "The march of civilization does not seem to have ameliorated the rigors of English criminal law to any great extent, if it is to be judged by the above. We suppose Mr. Justice Stephen donned the black cap before passing sentence, but that adornment could have added little to the terror inspired by his words."

It is a fair subject for discussion whether corporal punishments are, upon the whole, advisable in the case of adult criminals. We are not enthusiastic admirers of them, and it is certain that they should be ordered with the utmost caution, and only by magistrates of the greatest experience and intelligence. But if it be admitted that this was a fair case for the application of the most rigorous punishment awarded by the law, we do not find anything extravagant in Mr. Justice Stephen's homily. There is a great fascination in such trials for the depraved, and *quasi*-criminal classes—that is to say, those who have not yet done anything by which they have been "found out." It is well known that the persons who are most likely to yield to temptation are keenly attracted to the courts on such occasions, and who can say how potent a word in season may be to prevent them from straying from the path of rectitude, which, by a warning more impressive than any sermon, and delivered to persons whom no sermon is likely to reach, they find is also the path of safety.

OVERWORK.

The London *Lancet* reads a moral from the sudden death of the Lord Chief Justice of England, to the effect that aged and energetic men who "feel well" should avoid throwing too much work on organisms which must, in the nature of things, be weakly even when they seem strong. This is very true, but it is spoken like a doctor, who looks at the subject from his own point of view. Not to speak of the heroic deeds which have excited the enthusiasm of the world, what would have become of many of the greatest achievements in every department of human action if the actors had studied only personal considerations? Lord Beaconsfield, in *Endymion*, touches upon this with regard to

Lord Roehampton (p. 394):—"To a minister responsible for the interests of a great country they (remonstrances against night-work) are vain, futile, impossible. One might as well remonstrate with an officer on the field of battle on the danger he was incurring."

STEPS TO THE WOOLSACK.

The publication of the late Lord Campbell's journal, in the biography prepared by his daughter, discloses one remarkable instance of the Chancellor's intense anxiety to get on in the world. At the age of 33, and when making more than a thousand a year, he conceived it to be necessary to learn dancing: "I was at last driven to the resolution of applying to one of the dancing masters who teach grown gentlemen. Accordingly on my return from the circuit I waited upon a celebrated artist from the Opera House. Chassé! Coupé! Brisé! One! Two! Three! I may say I devoted the long vacation to this pursuit. I did not engage in special pleading with more eagerness. I went to my instructor regularly every morning at ten, and two or three times a week. I returned in the evening. You may be sure I was frightened out of my wits lest I should be seen by any one I knew. I might have met an attorney's clerk accustomed to bring me papers, or possibly my own clerk. It required some courage to face this danger, and I give myself infinite credit for the effort I have made. I have been highly lucky; not recognized a single face I had seen before! My morning lessons were private, but to learn figures it was of course indispensably necessary to mix with others. I met several dancing masters from the country, dashing young shop-keepers, ladies qualifying themselves for governesses, &c., &c. I have attended so diligently and made such progress, that I verily believe that I pass for a person intending to teach the art myself in the provinces. I entered by the name of Smith; but my usual appellation is 'the gentleman.'"

THE VALUE OF FRAGMENTS.

The *American Law Review*, for March, has a valuable article, suggesting the desirability of lawyers putting into permanent and accessible

form the results of such original investigations as they may have occasion to make in the course of their professional work. The remarks of our contemporary are probably even more applicable in Canada, than in the United States where the law publishers' monthly lists of publications, and the tables of contents of numerous and carefully written Reviews and Journals, indicate that the intellectual activity of the profession is not confined to the exigencies of pending cases. "What we propose by these general remarks," says the *Law Review*, "is to urge upon members of the profession of the law who have much or little learning, but who have enough to know whether or not what they have is sound or useful, not to file it away, or to wait until they are either great or famous; for the probability is that—begging their pardon—the most of us will become neither; but to put it into a useful shape, and find somebody to publish it. Usefulness to the profession is the safe *via media* to begin upon. Whenever any successful attempt is made to put matters which are at stake in law or its practice into an interesting or simply useful form, the response is immediate all over the profession. Probably many a lawyer who does not keep the run of the legal periodical literature, but who has written or said something worth saying about his work in a clear, forcible, and happy way, would be surprised to find how apt it is to be repeated in all parts of this country and in Canada, England, Scotland and Ireland." This, though not in the spirit of Juvenal's exhortation, "*frange, miser, calamos, vigilataque proelia dele*," is sound advice, if discreetly followed.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, Feb. 15, 1881.

DORION, C. J., MONK, RAMSAY, CROSS, BABY, J. J. DALY (def. below), Appellant, & CHEVRIER (plff. below), Respondent.

Serment supplétoire improperly deferred—Costs.

The action was brought by the respondent to recover the amount of an account, \$243.32, for goods sold and delivered.

The appellant, by her plea, confessed judgment for \$225.

The judgment of the Superior Court was rendered by Torrance, J., as follows :

"The Court, etc. . . .

"Considering that the balance due by defendant, if the evidence for the plaintiff is to prevail, appears to have been \$231.48, but that it is right to give some effect to the statements of defendant's witnesses who contradict the indebtedness as to the items :

Bottines	\$2 25
2 lbs. tea	1 60
6 bushels potatoes	1 80
Table Cloth	2 50

In all \$8 15

which the Court will allow, less 1 lb. tea, 80 cents, that is to say \$7.35, in deduction of the said sum of \$231.48, by which the indebtedness of defendant, at the date of the institution of the action, is established at the sum of \$224.13, doth condemn defendant to pay to plaintiff the sum of \$225 admitted by her plea, in order to avoid the trouble and uncertainty of a contestation with the plaintiff, with interest on \$225 from the 27th day of February 1877, day of service of process, and costs of suit as offered by defendant by her plea, to wit until after the filing of the said plea, *distracts* to O. Augé, Esq., plaintiff's attorney ; and considering that plaintiff has failed to establish any indebtedness beyond the amount so offered, the Court doth condemn plaintiff to pay to the defendant the costs of the contestation in this matter, *distracts*, &c."

The case was taken by the plaintiff, (respondent) to Review, where the following interlocutory judgment was rendered, Dec. 21, 1878 :

"The Court, now here sitting as a Court of Revision, having heard the parties by their respective counsel upon the judgment rendered in this cause on the 17th of June last (1878) by the Superior Court for the District of Montreal, and considering the defendant to be in bad faith, doth, *avant faire droit*, order the plaintiff to answer upon the *serment supplétoire* before this Court, on the thirtieth instant, or any day next term."

The final judgment of the Court of Review was as follows :

"The Court, etc. . . .

"Considering that there is error in the said judgment of the 17th of June 1878, doth, revising said judgment, reverse the same, and

proceeding to render the judgment that ought to have been rendered in the premises ;

"Considering that it results from the proof, including the *serment supplétoire* of plaintiff, whose statement under said oath the Court accepts, that he, plaintiff, was and is entitled to judgment against defendant for more than allowed by the judgment complained of, and for more than tendered by defendant, and that the said judgment of the 7th of June, 1878, is erroneous in allowing so little to plaintiff; doth condemn the said defendant to pay and satisfy to said plaintiff the sum of \$228.98, with interest thereon from the 27th of February 1877, day of service of process, till paid ; with costs in the said Superior Court against said defendant in favor of said plaintiff, and with costs of this Court of Revision against said defendant in favor of said plaintiff, distraction of which costs is granted," etc.

The recorded judgment fully explains the decision in appeal. It is as follows :

"Considérant que cette action n'a été portée que pour la somme de \$243.32, et que l'appelante a par ses défenses reconnu devoir sur cette somme celle de \$225, pour laquelle elle a offert de confesser jugement ;

"Et considérant que l'intime, n'ayant pas pu établir par sa preuve que l'appelante fut endettée en une somme excédant celle pour laquelle l'appelante avait offert de confesser jugement, a, par motion, offert son serment supplétoire, qui n'a pas été admis par la cour de première instance, qui a rendu jugement contre l'appelante pour la somme de \$225 et les dépens jusqu'à la production des défenses inclusivement, et condamnant l'intimé aux dépens encourus depuis ;

"Et considérant que l'intimé a inscrit cette cause en révision, et que la seule contestation entre les parties sur la révision n'était que pour une somme de \$18.32, différence entre la somme de \$225, montant accordé par le jugement de la cour de première instance et celle de \$243.32, montant de la demande de l'intimé ;

"Et considérant que la cour de révision a reconnu par son jugement interlocutoire du 21e jour de décembre 1878, que l'intimé n'avait pas prouvé sa dette au-delà de la somme accordée par la cour de première instance, et se fondant sur ce que l'appelante était de mauvaise foi

elle aurait déferé à l'intimé le serment supplétoire ;

" Et considérant que par ses réponses sur serment supplétoire, l'intimé n'a pu établir qu'il lui était dû par l'appelante qu'une somme de \$3.98 de plus que la somme que l'appelante avait reconnu lui devoir, et que nonobstant que l'intimé ait failli de prouver par son propre serment près des trois quarts de la somme en contestation sur sa demande en révision, la cour de révision a condamné l'appelante à payer cette somme de \$3.98, avec en outre tous les frais encourus depuis la production des défenses ainsi que tous les frais encourus en révision ;

" Et considérant que rien ne fait voir que l'appelante, qui a réussi pour la plus grande partie des items qu'elle a contestés dans le compte de l'intimé, fut de mauvaise foi, et qu'en outre c'est le commencement de preuve qui autorise la cour à déferer le serment supplétoire, et non la mauvaise foi des parties ou de l'une d'elles ;

" Et considérant que sous les circonstances il n'y avait pas lieu de déclarer, comme la cour de révision l'a fait par son jugement interlocutoire, que l'appelante était de mauvaise foi, ni d'ordonner le serment supplétoire de l'intimé, ni de réformer le jugement rendu par la cour supérieure, et encore moins de condamner l'appelante aux frais considérables d'enquête et de révision pour la modique somme de \$3.98 ;

" Et considérant qu'il y a erreur tant dans le jugement interlocutoire du 21 décembre 1878, que dans le jugement final rendu par la cour siégeant en révision le 31^e jour de janvier 1879 ;

" Cette cour casse et annule les dits deux jugements, savoir, le dit jugement interlocutoire du 21 décembre 1878, et le dit jugement final du 31 janvier 1879 ; et confirme le jugement rendu par la cour de première instance le 17^e jour de juin 1878 ; et condamne l'intimé à payer à l'appelante les dépens suivant le jugement de la dite cour de première instance, avec en outre les frais encourus en cour de révision et sur le présent appel. (*Dissentiente l'Hon. M. le Juge Baby.*)"

Judgment reversed.

J. E. Robidoux for Appellant.

Augé & Laviolette for Respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, Jan. 26, 1881.

DORION, C. J., MONK, RAMSAY, CROSS, BABY, JJ.

FAIR et al. (defts. below), Appellants, and DÉSILETS (plff. below), Respondent.

Insolvent Act—Remedy against assignee.

An ordinary petitory action will not lie against an assignee for the recovery of real estate in his possession as assignee.

This was an appeal from a judgment of the Superior Court, Montreal, Sicotte, J., Nov. 13, 1877, dismissing a *défense en droit*, and from the final judgment in the same cause, April 1, 1879, maintaining a petitory action brought by respondent against Mr. Fair in his quality of assignee of Dubrule Brothers, to recover a lot of land and house in Acton Vale. The action was demurred to by Cushing, who intervened as *garent* and took up the *fait et cause* of the assignee, on the ground that under the Insolvent Act assignees are subject to the summary jurisdiction of the Court sitting in insolvency, and that such summary process should have been resorted to in the present instance. The Court below overruled this demurrer, and the action was maintained by the final judgment subsequently rendered.

The judgment dismissing the demurrer was as follows :

" La Cour, etc....

" Considérant que l'Acte des Faillites n'a aucune disposition, à l'effet d'enlever aux personnes qui ont été dépourvues de leur propriété, par les faits d'un failli, leur recours pour revendiquer leurs droits d'après le droit commun ;

" Considérant que la revendication d'un immeuble qui n'est pas tombé dans la masse par un fait de la personne exerçant cette revendication, et qui n'a aucune relation d'affaires avec le failli, et ne pouvait faire valoir aucune réclamation contre cette dernière, lui donnant droit d'agir comme créancier de la faillite, et de prendre part aux délibérations du Syndicat, est un fait qui n'est pas affecté par le Statut sur la Faillite ;

" Déclare le demandeur bien fondé à exercer l'action pétitoire par le mode qu'il a adopté, déclare la défense en droit mal fondée, et la déboute avec dépens."

In appeal, the judgment was reversed, the *considerants* being as follows :

"Considering that, under Sect. 125 of the Insolvent Act of 1875, *all remedies sought for enforcing any claim for a debt, privilege, mortgage, hypothec, lien or right of property* upon, in or to any effects or *property* in the hands, possession or custody of the assignee, may be obtained by an order of the Judge on a summary petition in vacation, or of the Court on a rule in term, and *not by any suit, attachment, opposition, seizure or other proceeding of any kind whatsoever* ;

"And considering that the respondent has by his action claimed from the appellant as assignee to the estate of H. T. Dubrule, a right of property on the real estate described in the declaration in this cause, and which is admitted by the declaration to have been at the time in the possession of the respondent in his said capacity of assignee, and that the respondent should have proceeded by summary petition under the provisions of the Insolvent Act, and not by a petitory action ;

"And considering that there is error in the judgment rendered by the Superior Court sitting at St. Hyacinthe on the 1st of April, 1879 ;

"This Court doth reverse the said judgment of the 1st of April, 1879, and dismiss the action of the said respondent *sauf recours*, and doth condemn the said respondent to pay the costs incurred in the Court below as well as on the present appeal." (Hon. Mr. Justice Monk dissenting).

Judgment reversed.

Robertson & Co., for Appellant.

Geoffrion, Rinfret & Dorion, for Respondent.

SUPERIOR COURT.

[In Chambers.]

MONTREAL, March 4, 1881.

Before TORRANCE, J.

GAGNON V. LALONDE.

Separation from bed and board—Attachment of the moveable effects of the community by the wife— C. C. 204.

This was an action *en séparation de corps et de biens*. The plaintiff obtained an order from the judge to attach the moveables of the defendant, her husband, for the protection of her rights in the community. Under this order, a seizure

was made in the hands of the Banque Jacques-Cartier. The defendant presented a petition for the removal of the attachment as illegal and informal, because it did not comply with C. C. P. 834; 987.

J. M. Loranger, Q.C., supporting the attachment, cited C. C. 204, and No. 35 S. C. M., *Morgan v. Emerson*, decided December 18, 1875.

PER CURIAM. I see no difficulty in this case. The attachment appears to be in form. It would appear that the husband, as a judicial guardian, has a right to claim delivery of the property seized, and may have it on assuming the responsibility of a judicial guardian.

Proof ordered *avant faire droit*.

J. M. Loranger, Q.C., for plaintiff.

A. Mathieu,
R. Laflamme, Q.C. } for defendant.

SUPERIOR COURT.

MONTREAL, March 5, 1881.

Before TORRANCE, J.

FORGET dit DEPATY V. SENECALE.

Minor — Evidence — Action en déclaration de paternité.

The minor may be interrogated on matters within his cognizance, in causes instituted for him by his tutor.

The action here was *en déclaration de paternité*. The *tuteur* brought the action in the interest of a minor of the name of Marie des Neiges St. Pierre, minor daughter of Amedée St. Pierre, who, the tutor alleged, had been seduced by the defendant.

PER CURIAM. The question here is whether the minor can be interrogated. Jousse, Comm. Ord. 1667, p. 90, says the minor (*pubère*) may be interrogated on matters in his cognizance in causes instituted for him. 1 Pigeau, p. 228, says that as the minor cannot alienate, his *aveu* cannot harm him, but at p. 236, he says : " Mais " on peut faire interroger celui des intérêts de " qui il s'agit, pour corroborer ou compléter la " preuve qui résultera de l'interrogatoire subi " par le tuteur ou autre administrateur." And then he lays down the rule as Jousse has done at p. 90. The minor may therefore be interrogated "pour y avoir tel égard que de raison." The service upon the attorney *ad litem* is available if the party is absent or absconding (C.C.P.

223), and there is a return by the bailiff to that effect. The order of the Court is that the minor make answer.

Bisaillon for plaintiff.

Bonin for defendant.

SUPERIOR COURT.

MONTREAL, March 9, 1881.

Before TORRANCE, J.

LA BANQUE VILLE MARIE V. LA SOCIÉTÉ DE CONSTRUCTION DU CANADA, & JOLICŒUR et al., Garnishees.

Contestation of declaration of garnishee.

This case was before the Court on a motion by the Bank to be allowed to contest the declaration of the garnishee, J. B. Raymond Dufresne, made in December, 1877, and on the motion of Dufresne that he be discharged from the seizure.

The Court had before it in February a petition by the Bank to be allowed to contest the declaration, and another motion by Dufresne for peremption. The petition of the Bank failed because it showed no reasons why it should be allowed to contest, and was unsupported by affidavit. The demand for peremption failed because the petition of the Bank, served a few days before, was held to be an interruption of the peremption. The present application of the Bank gave no reasons why it should be allowed at this late date to contest, nor any grounds of a contestation. It also appeared that the Bank had lodged another attachment in the hands of the garnishee.

On the whole the Court held that there was now no reason why the application of Dufresne should not be granted, and why the application of the Bank should not be rejected.

Motion by Dufresne granted. Motion by Bank rejected.

Charbonneau for the Bank.

Mercier, Q.C., for Dufresne.

SUPERIOR COURT.

MONTREAL, September 13, 1880.

Before SICOTTE, J.

MOLSONS BANK V. H. LIONAIS ès-qualité, & J. D. E. LIONAIS et al., Oppts.

Interpretation of Will—Powers of Executor.

The case arose upon the interpretation of the

will of the late Madame Lionais. See *Molsons Bank v. Lionais*, 3 Legal News, p. 82, in which Mr. Justice Jetté gave a similar judgment in a case under the same will.

SICOTTE, J. Une saisie immobilière a été pratiquée sur le défendeur en exécution du jugement rendu contre lui en sa qualité d'exécuteur testamentaire et d'administrateur des biens de madame Lionais, leur mère, pour des billets qu'il avait endossés en cette qualité.

Les opposants, qui ont été institués légataires universels de madame Lionais, leur mère, ont réclamé contre cette saisie.

Les faits de l'instance constatent ce qui suit comme l'exposé et la base des prétentions des parties.

Par son testament, madame Lionais institua les opposants, enfants nés de son mariage avec le défendeur, ses légataires universels.

Ensuite, elle désigna pour exécuter son testament, son époux et lui donna la saisine durant sa vie, sans être tenu de fournir caution, ni de faire inventaire, ni de rendre compte.

Et subéquemment, elle nomme son époux administrateur de ses biens, tant en propriété qu'en usufruit, avec pouvoir de les vendre, aliéner, hypothéquer et autrement en disposer, soit en propriété, soit en usufruit, fruits et revenus, l'autorisant à faire exécuter tous billets et obligations et faire tous autres actes d'administration, sans qu'il fut besoin d'autorisation préalable des cours de justice, ni du consentement, ni de l'intervention de ses héritiers, déclarant qu'elle veut que son exécuteur agisse comme il l'a fait depuis longtemps en vertu de la procuration qu'elle lui a donnée, ratifiant tout ce qu'il a pu faire et tout ce qu'il fera à l'avenir, avant et après son décès, en vertu de cette procuration et de son testament, et voulant que toutes choses faites par son époux, en ses dites qualités, eussent leur plein et entier effet et fussent suivies et exécutées selon leur forme et teneur, sans division ni discussion, et, subsidiairement, la testatrice affirme son désir que son exécuteur fasse la disposition et partage de ses biens, comme il le jugera convenable et dans le temps qui lui paraîtra opportun, lui donnant toute la latitude possible et laissant entièrement à sa discrétion la manière de percevoir et d'appliquer les revenus ainsi que les capitaux, et le soin de pourvoir comme il l'entendra au soutien, à l'éducation et à l'établissement de ses enfants,

et selon qu'il le jugera à propos à et entre tous ses enfants ou aucun d'eux, soit par testament, *donation entre-vifs* ou autrement, déclarant que son époux ne doit être aucunement lié dans ses actions et dispositions, *par les termes dans lesquels est conçu l'article 3 du testament*, lequel ne peut et ne pourra, en aucun cas, être interprété comme conférant un droit absolu d'hérédité en faveur d'aucun de ses enfants, mais uniquement un droit éventuel sujet à la volonté de son époux à-qualité ; en sorte, dit la testatrice, que les dits héritiers ne pourront, en tout état de chose, prétendre qu'à ce que son mari décidera de leur accorder, si toutefois il jugeait à propos de le faire dans la proportion qu'il jugera convenable et à l'époque qu'il croira la meilleure, sans que les héritiers ni aucun d'eux ne puisse jamais réclamer contre les actes, opérations et dispositions de son époux, qu'elle laisse entièrement libre sous tous les rapports.

La testatrice déclare que sa volonté est que ses biens soient et restent insaisissables et ne puissent être saisis et vendus que pour les dettes de sa succession, c'est-à-dire celles auxquelles elle a souscrit ou qu'elle souscrira, auxquelles elle a été ou sera partie.

Les enfants de madame Lionais se fondent sur cette dernière clause du testament pour opposer la saisie immobilière. Ils prétendent que la dette réclamée contre le défendeur à-qualité n'est pas une dette de leur mère et de la succession de leur mère, partant que les immeubles saisis, qui sont des biens de cette succession et leur appartenant en propriété, mais dont le défendeur n'a que l'administration, ne peuvent être saisis et vendus pour une dette contractée par ce dernier, quoiqu'elle ait pu être contractée pour le profit et avantage d'un des enfants.

Il est prouvé que les billets dont le paiement est réclamé, ont été endossés par leur père en sa qualité d'exécuteur et d'administrateur, pour les fins du commerce et des affaires de Charles Lionais, un des héritiers, et dans son intérêt.

Toute la question à résoudre dépend de l'interprétation à donner au testament, quant aux pouvoirs conférés au père, et quant aux droits et aux avantages accordés au père et aux enfants.

Le père est-il légataire avec le droit de propriétaire ? Les termes du testament sont aussi amples qu'ils sont expresses et spécifiques. Il

pourra vendre, aliéner comme il le voudra, employer les revenus et les capitaux suivant sa discrétion, il n'est aucunement lié par les termes de l'article 3 qui avait déclaré les enfants légataires universels, mais que cet article ne pourrait être interprété en aucun cas comme conférant un droit absolu d'hérédité, mais uniquement un droit éventuel, sujet à la volonté de son époux à-qualité. Il pourra disposer de tout comme de choses à lui, et a, durant sa vie, maîtrise absolue sur tout, sans être tenu de rendre compte. Ce qu'il aura dépensé, aliéné, il n'est pas tenu de le rendre.

Le testament confère donc au père tout ce qui constitue le droit d'un propriétaire sur la chose désignée et d'une manière absolue.

Dans l'espèce, l'intention du testateur est évidente par tout le contenu du testament, comme elle est formellement exprimée.

Comme l'exprime Kent : " In the construction " of devises, the intention of the legislator is " admitted to be the pole star by which the " courts must steer."

Blackstone donne l'enseignement suivant : " In construing a will the court must first " look to the particular clause in question, at " the same time taking into view the whole " instrument, endeavoring to give meaning and " effect to every clause of it."

Cujas avait dit déjà : " Pour connaître la " volonté du testateur, il faut commencer par " connaître l'esprit général du testament : ce " qui ne peut se faire que par la combinaison " des différentes clauses et la comparaison qu'on " peut en faire en les rapprochant."

La dernière clause qu'invoque les opposants, si elle est interprétée littéralement, annulerait le contenu et toute la teneur du testament. Elle serait alors en contradiction directe du pouvoir de vendre, d'aliéner, de disposer, d'hypothéquer, dans le but de fournir l'éducation, le soutien de la famille et d'aider les enfants dans leur établissement.

L'ensemble de l'instrument place tout sous le contrôle absolu du père, il permet à ce dernier d'agir comme la testatrice aurait pu le faire. Le maintien de la famille, l'établissement des enfants, voilà la fin exclusive cherchée par le testament. L'épouse, la mère, met tout son bien entre les mains de l'époux, du père, pour faire selon qu'il le voudra tout ce qu'elle aurait pu faire ; déclarant que les volontés, les actes de

son époux seront absolus à l'encontre de ses héritiers, comme sa volonté et son fait personnel.

Par notre droit le droit du testateur est absolu. De fait, il garde la direction de ses biens après sa mort. Et la remarque suivante de Leibnitz est aussi grande de pensée philosophique que juste d'application judiciaire.

"Testamenta vero meo, nullius essent momenti nisi anima esset immortalis, sed quia adhuc vivunt ideo manent domini rerum." (nova methodus discendæ docendæque jurisprudentiæ.)

Ainsi les morts vivent effectivement, ils demeurent toujours maîtres de leurs biens. Cette testatrice voulait constituer la famille par la direction qu'elle accorde au père.

Cette philosophie de Leibnitz est un fonds de la jurisprudence de l'Angleterre. Elle est davantage empreinte de la forme légale et les juges s'efforcent de la faire prévaloir.

Comme l'enseigne lord Cotenham : "It is the duty to put that construction to the words which seems best to carry the intention into effect. The court will not assume that the testator was ignorant of the consequence and effect of the disposition which he has himself made."

Les opposants ne peuvent pas plus annuler les opérations d'actes de leur père, que les actes de leur mère.

Ce n'est pas un simple état de possession que le testament confère et donne au mari ; mais, au contraire, le pouvoir de vendre et de disposer d'une manière absolue, sans contrôle des cours et des héritiers légaux.

Dans les cas ordinaires le légataire a un commencement de propriété, indépendamment de la volonté de l'exécuteur testamentaire. Rien de tel dans l'espèce. C'est la volonté de ce dernier qui fera le legs de ce qui restera. Ce qui démontre que le père est légataire avec droit de propriétaire, pouvant faire profiter ses enfants de la chose léguée s'il le veut et de la manière qu'il le voudra.

Dans des cas analogues, on décide en Angleterre dans le sens que je viens d'indiquer.

A testator by his will gave realty and personality to his widow for the term of her natural life, to be disposed of as she may think proper for her own use ; and "in the event of her decease should there be anything remaining

"of the said property, he gave said part" to certain persons :

Held, that the widow took a life interest with an absolute power of disposition exercisable by her during her lifetime. (Fisher's Annual, 1879.)

A husband gave all his real and personal estate to his wife, "with full power to dispose of the same as she may think proper for benefit of my family, having full confidence that she will do so" :

Held, that she took absolutely. (Same, 1878.)

Les opposants ne peuvent intervenir entre la volonté de leur mère, dont ils invoquent les ordonnances et dernières volontés, comme base de leurs droits et de leur titre. "Dicat testator et erit lex voluntas ejus."

Cette volonté a statué entièrement autrement qu'ils le prétendent. La cour doit maintenir cette volonté contre celle des enfants.

Opposition déboutée.

Barnard, Monk et Beauchamp pour les demandeurs.

J. O. Joseph pour les opposants.

GENERAL NOTES.

A magazine article on James Russell Lowell states that he was a lawyer in his youth, but "without a practice, somewhat exquisite in matters of dress, and given to penning odes instead of briefs."

THE STATUTE OF FRAUDS.—In the year 1676, in England, there was enacted Stat. 29 Car. 2. c. 3, entitled : "An Act for the Prevention of Frauds and Perjuries," and it is familiarly known as the Statute of Frauds. Its preamble declares its object to be the "prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury." Mr. Smith observes : "It is said to have been the joint production of Sir Matthew Hale, Lord Keeper Guilford, and Sir Leoline Jenkins, an eminent civilian. The great Lord Nottingham used to say of it 'that every line was worth a subsidy ;' and it might now be said, with truth, that every line has cost a subsidy, for it is universally admitted that no enactment of any legislature ever became the subject of so much litigation. Every line, and almost every word of it, has been the subject of anxious discussion, resulting from the circumstance that the matters which its provisions regulate are those which are of every day occurrence in the course of our transactions with one another." Mr. J. P. Bishop adds : "This statute, while its policy has been doubted by some, has, on the whole, been received with so much favor that its provisions have not only been continued in England ; but, with occasional modifications, they have been adopted by legislation in probably every one of our own States."

The Legal News.

VOL. IV. MARCH 19, 1881. No. 12.

PROPOSED LAW SOCIETY.

At a preliminary meeting held in Montreal on the 11th instant, which was attended by a fair representation of the members of the bar, Mr. W. H. Kerr, Q.C., in the chair, the question of organizing a Law Society was considered, and appeared to meet with general approval. A committee was named to consider the details of the scheme, and to arrange for a general meeting of the bar on the 19th instant.

It would be premature, at the time we write, to discuss a proposal which has not taken definite form. It may be remarked, however, that the suggestion is one which has been made more than once during the last twenty years. It was expressly made in writing, nearly sixteen years ago, by Mr. G. W. Stephens, a prominent citizen, then a young practising member of the bar. His letter on the subject, addressed to the editor of the *Lower Canada Law Journal*, will be found at page 11 of the first volume of that publication.

No doubt excellent results might be expected from such an association. We assume, of course, that it would be co-extensive with the order of the bar itself. It is an elementary principle in mechanics, that the weight of the whole compound is equal to the sum of the weights of the separate elements, and if the influence of the bar organization as a whole is not what might be desired, it could hardly be expected that a section or fragment of it would, as such, exert any greater influence.

PUBLIC LIBRARIES.

The Bench of Massachusetts, it appears, has recently lost an affluent and public-spirited member; for we are told that Judge Forbes, late of the Supreme Court, has bequeathed to Northampton the sum of \$200,000 for the establishment of a public library. The learned Judge does not seem to have been gifted with the prophetic vision which is sometimes popularly attributed to the dying; for he has annexed to his gift the illiberal condition that no minister of religion shall have anything to do with the management of the institution. If the condition be not complied with, the money is to go

to Harvard College. This is not quite so bad as the late Mr. Girard, who willed that no minister of religion should cross the threshold of the buildings which were to be erected by the aid of his munificent bequest; but it indicates either that Judge Forbes was not altogether free from bigotry, or that his experience of the clergy was singularly unfortunate.

Public libraries, however, with or without whimsical, bigoted, or fanatical conditions, are sadly needed. It is much to be regretted that the Fraser bequest, though not hampered by any offensive clause, has thus far failed in its purpose to establish one in Montreal. We doubt whether there is any city of the same size and wealth in the United States so destitute in this respect. It remains for some one to claim the honorable distinction of being the first to endow the chief city of the Dominion with this noble gift.

SUPREME COURT BUSINESS.

We are able to publish in this issue a large number of the recent decisions of the Supreme Court. It is evident that no well-founded complaint exists on the score of promptitude in the dispatch of business. The Court seems to be keeping fairly up to the work devolving upon it. For example, in two cases decided in Montreal during the last December term of the Court of Appeal—*Shaw & Mackenzie*, and *Abrahams v. Regina*—judgment has already been rendered by the Supreme Court. This is certainly expedition enough for all practical purposes, and outdoes the majority of Supreme Courts the world over. It is well that it should be so, because it is probable there will soon be a great increase in the volume of business before the Court, and it is desirable that no ground should be lost while the tribunal is yet in its infancy and has not too much to do.

NOTES OF CASES.

SUPREME COURT OF CANADA.*

OTTAWA, March 3, 1881.

SHAW, Appellant, v. MACKENZIE et al., Respds.

Capias—Damages—Want of probable and reasonable cause—Art. 798 C.P.C.

This was an appeal from a judgment of the Court of Queen's Bench for the Province of

*Notes by Geo. Duval, Esq., in advance of the regular reports.

Quebec, Nov. 12, 1880, (See 3 Legal News, p. 369), affirming the judgment of the Superior Court, (See 2 Legal News, p. 5), by which the plaintiff's action was dismissed.

The plaintiff (present appellant) claimed damages from the respondent for the malicious issue and execution of a *capias* against him, the plaintiff, at Montreal, in July, 1878.

The defendants, on appeal, relied on a plea of justification, alleging that when they arrested the appellant, they acted with reasonable and probable cause. In his affidavit, the reasons given by the deponent Kenneth Mackenzie, one of the defendants, for his belief that the appellant was about to leave the Province of Canada were as follows: "That Mr. Powis, the deponent's partner, was informed last night in Toronto by one Howard, a broker, that the said W. J. Shaw was leaving immediately the Dominion of Canada, to cross over the sea for Europe or parts unknown, and deponent was himself informed, this day, by James Reid, broker, of the said W. J. Shaw's departure for Europe and other places." The appellant Shaw was carrying on business as wholesale grocer at Toronto, and was leaving with his son for the Paris Exhibition, and there was evidence that he was in the habit of crossing almost every year, and that his banker and all his business friends knew he was only leaving for a trip; and there was no evidence that the deponent had been informed that appellant was leaving *with intent to defraud*. There was also evidence given by Mackenzie, that after the issue of the *capias*, but before its execution, the deponent asked plaintiff for the payment of what was due to him, and that plaintiff answered him "that he (Shaw) would not pay him, that he might get his money the best way he could."

Held, on appeal, that the affidavit was defective; the fact of a debtor, about to depart for England, refusing to make a settlement of an overdue debt, is not sufficient reasonable and probable cause for believing that the debtor is leaving *with intent to defraud his creditors*. Art. 798 C.P.C. Judgment reversed; \$500 damages awarded.

Appeal allowed.

Maclaren, and Rose, for Appellant.

Doutre, Q.C., for Respondents.

ABRAHAM, Appellant, v. THE QUEEN, Respondent.

Indictment—Delegation of authority by Attorney General—32 & 33 Vic. cap. 29, sec. 28.—Obtaining money by false pretences.

This was an appeal from a judgment of the Court of Queen's Bench, Montreal, (see 4 Legal News, p. 41; 24 L.C.J., p. 325).

The indictment contained four counts for obtaining money by false pretences.

On the indictment was endorsed: "I direct that this indictment be laid before the Grand Jury."

Montreal, 6th October, 1880.

L. O. LORANGER,
Atty. General.

"By J. A. Mousseau, Q. C.

"C. P. Davidson, Q. C."

Defendant moved to quash the indictment. The motion was supported by affidavit, and the learned Chief Justice rejected it, intimating at the time that as he had some doubts, he would reserve the case, should the defendant be convicted. The defendant was found guilty, and the following questions *inter alia* were submitted for the consideration of the Court of Queen's Bench:

1. Whether the Attorney General could delegate his authority, to direct that the indictment in this case be laid before the Grand Jury, and whether the direction as given on the indictment, was sufficient to authorise the Grand Jury to enquire into the charges and report a true Bill.

2. Whether if the indictment was improperly laid before the Grand Jury it should have been quashed on the motion made by the defendant?

It was admitted that the Attorney General gave no direction with reference to this indictment, and that the gentlemen who put the endorsement on the indictment, did so merely because they were representing the Crown at the current term of the Queen's Bench under a general authority to conduct the Crown business at such term, but without any special authority over, or any directions from the Attorney General in reference to this particular indictment.

Held, on appeal, that under 32 and 33 Vic., c. 29, sec. 28, the Attorney General has no authority to delegate to the judgment and discre-

tion of another the power which the Legislature has authorized him personally to exercise; that no power of substitution had been conferred, and therefore the indictment was improperly laid before the Grand Jury.

Appeal allowed.

J. Doutre, Q. C., for Appellant.

C. P. Davidson, Q. C., for Respondent.

OTTAWA, February, 1881.

GINGRAS, Appellant, v. DESILETS et al., Respondents.

Damages—Judgment of the Court of first instance.

This was an action brought by appellant against the late P. O. Desilets, the original defendant in the cause, claiming a sum of \$4,000 damages: 1st. by injurious words, threats and false arrest; 2nd. by violence and wounds causing the appellant to have one of his fingers amputated, as well as a long and excessively painful disease, to wit: the lock-jaw, which put him for a long time in imminent danger of death, and left him crippled and with his general health gravely affected for the future.

The defendant appeared by his attorney, but did not file any plea. After taking the evidence, the Superior Court at Three Rivers, condemned the respondents, (the present cause having been continued against them by *reprise d'instance*, as heirs and testamentary executors of the said P. O. Desilets), to pay to the appellant the sum of \$3,000 damages.

On appeal to the Court of Queen's Bench, the judgment of the Superior Court was reduced to \$600, the amount allowed to the appellant, and he was condemned to pay all the costs of appeal.

Held, that inasmuch as the damages awarded were not of such an excessive character as to show that the Judge who tried the case had been either influenced by improper motives or led into error, the amount so awarded by him ought not to have been reduced. [Taschereau, J., dissenting.]

Appeal allowed with costs.

O'Gara, Q.C., & *Hould*, for Appellant.

Angers, Q.C., for Respondents.

LEVI, Appellant, v. REED, Respondent.

Jurisdiction—Right of appeal by plaintiff, respondent in Court of Queen's Bench—Slander—Verdict of Judge.

The present appellant had sued the respon-

dent before the Superior Court at Arthabaska, in an action of \$10,000 damages for verbal slander. The judgment of the Superior Court awarded to the appellant a sum of \$1,000 for special and vindictive damages.

By the judgment of the Court of Queen's Bench, the amount awarded was reduced to \$500, and costs of appeal were against the present appellant.

Held, on appeal, 1. That the plaintiff, although respondent in the Court of Queen's Bench, was entitled to appeal, as in determining the amount of the matter in controversy between the parties, the proper course was to look at the amount for which the declaration concludes, and not at the amount of the judgment. *Joyce v. Hart*, 1 Can. S. C. R. 321, reviewed. [Taschereau, J., dissenting.]

2. That, as in the case of *Gingras v. Desilets*, the amount of damages fixed by the judge who tried the case ought not to have been reduced.

Appeal allowed with costs.

Geo. Irvine, Q.C., and *Gibson*, for Appellant.

W. Laurier, Q.C., for Respondent.

DOMINION TELEGRAPH COMPANY, Appellant, v. GILCHRIST, Respondent.

Trespass—Right of Company to cut ornamental trees.

The servants of the Company, in erecting their line through Norton, King's County, cut down ornamental trees on Dr. Gilchrist's property, claiming the right to do so under their act of incorporation. In an action of trespass, tried at King's County, Dr. Gilchrist obtained a verdict for \$235 damages, which was sustained by the Supreme Court of New Brunswick. The Company appealed on the following grounds: 1. That the practice of the Court not to allow the defendant to cross-examine a witness to prove his plea, as decided in *Atkinson v. Smith*, 4 Allen, 309, was erroneous; 2. That as the Company had the right to cut down ornamental or shade trees where necessary for the erection, use or safety of their line, they were the judges of that necessity; and 3. That the plaintiff's remedy was under the clause in the Company's Act referring to arbitration, and ousted the jurisdiction of the courts.

Held, overruling these objections, that the Company should be held to a strict construction of their act of incorporation, and were bound to prove that it was neces-

sary for the erection, use or safety of their line to cut these trees, and that having failed to do so, they were liable.

Appeal dismissed with costs.

Hector Cameron, Q. C., for Appellant.

C. W. Weldon, Q. C., and *Burbridge*, for Respondents.

SNOWBALL, Appellant, v. STEWART, Respondent.

Action to recover logs—Withdrawal of objectionable evidence from the Jury—Misdirection.

This was an action brought by Mr. Stewart against Mr. Snowball, to recover a quantity of logs alleged to have been cut by parties named Sutherland and Kirwan, on lands held by plaintiff under license from the Government. On the trial, the admissions of these parties were admitted on the plaintiff's counsel undertaking to connect the defendant with these parties. This he failed to do, but called an agent of the plaintiff, to depose as to certain statements of Mr. Snowball. The Chief Justice withdrew the evidence of these admissions from the Jury, and directed them that if they thought Snowball admitted he had the logs, the plaintiff was entitled to a verdict. The jury found a verdict for the plaintiff. A new trial was moved for on the grounds: 1. That the Chief Justice had no right to withdraw the objectionable evidence admitted by him, from the jury. 2. That outside of these statements there was no evidence, and the learned Judge misdirected the jury on that point.

The Supreme Court of New Brunswick discharged the rule, and on appeal to the Supreme Court of Canada, it was:

Held, that there was no evidence that the logs sought to be recovered had been cut on plaintiff's premises, and that while the Chief Justice had the right to withdraw the objectionable evidence from the jury, he had misdirected the jury as to the effect of the statements made by Snowball to plaintiff's agent.

Appeal allowed.

Weldon, Q. C., for Appellant.

Wetmore, Q. C., for Respondent.

TEMPLE, Appellant, v. CLOSE, Respondent.

Trover—Vendor and Purchaser—Property in goods.

This was an action of trover for bricks. The plaintiff agreed with one Thomas, a brick-maker,

who had a kiln of bricks burnt, ready for use, containing somewhere in the vicinity of 100,000 bricks, to purchase, and paid for a portion of them, 50,000 according to sample. Thomas delivered to plaintiff 16,000, and the balance of the bricks was taken by the defendant, as Sheriff of York, under an execution against Thomas. The question to be decided on this appeal was, whether the bricks were the plaintiff's property, under what had taken place between Thomas and him, so as to exempt them from seizure under the execution.

Held, that there was no sale of a specific property under the contract, and that the property in the bricks did not pass to the purchaser until the bricks had been selected.

Appeal allowed with costs.

G. F. Gregory, for Appellant.

Wetmore, Q. C., for Respondent.

THE QUEEN, Appellant, v. BELLEAU et al., Respondents.

North Shore Quebec Turnpike Bonds issued under authority of 16 Vict. c. 235—Liability of Canada for the debts of the late Province of Canada.

The respondents, by Petition of Right before the Exchequer Court, set forth in substance: That the Province of Canada had raised, by way of loan, a sum of £30,000 for the improvement of Provincial highways situate on the North Shore of the river St. Lawrence, in the neighborhood of the City of Quebec, and a further sum of £40,000 for the improvement of like highways on the South shore of the river St. Lawrence; that there were issued debentures for both of the said loans, signed by the Quebec Turnpike Road Trustees, under the authority of an act of Parliament of the Province of Canada, 16 Vict. c. 235, intitled: "An Act to authorize the Trustees of the Quebec Turnpike Roads to issue debentures to a certain amount and to place certain roads under their control"; that the moneys so borrowed came into the hands of Her Majesty, and were expended in the improvement of the highways in the said Act mentioned; that no tolls or rates were ever imposed or levied on the persons passing over the roads improved by means of the said loan of £30,000; that the tolls imposed and collected on the highways improved by means of the said loan of £40,000

were never applied to the payment of the debentures issued for the last mentioned loan in interest or principal; that the Trustees accounted to Her Majesty, as well for the said loans as for the tolls collected by them; that at no time had there been a fund in the hands of the said Trustees adequate to the payment, in interest and principal, of the debentures issued for said loans; that the respondents are holders of debentures for both of the said loans to an amount of \$70,072, upon which interest is due from the 1st July, 1872; that the debentures so held by them fell due after the Union, and that Her Majesty is liable for the same, under sect. 111 of the B.N.A. Act, 1867, as debts of the late Province of Canada existing at the Union.

In his defence to this Petition, Her Majesty's Attorney General did not deny the liability of Her Majesty for the debts of the late Province of Canada, but he denied that the debentures in question were debentures of the Province of Canada; that the moneys for which they were issued were borrowed and received by Her Majesty; that there was any undertaking or obligation on the Province of Canada to pay the whole or any part of the said debentures.

Held, affirming the judgment of the Exchequer Court, that the debentures in question were debentures of the late Province of Canada: therefore, under the provisions of the B. N. A. Act, the Dominion of Canada was liable, but for the capital only of the said debentures, it being provided by cap. 235, sec. 7, that no money should be advanced out of the Provincial funds for the payment of the interest. (Ritchie, C.J., and Gwynne, J., dissenting).

Lusk, Q.C., and Church, Q.C., for Appellants.

McCarthy, Q.C., and Irvine, Q.C., for Respondents.

JONAS, Appellant, v. GILBERT, Respondent.

By-law—Power to impose License Tax—Discrimination between residents and non-residents—Ultra vires of 33 Vict. c. 4, (N. B.)

This was an action against the Police Magistrate of the City of St. John, for wrongfully causing the plaintiff (Jonas), a commercial traveller, to be arrested and imprisoned on a warrant issued on a conviction by the Police Magistrate, for violation of a by-law made by

the Common Council of the city of St. John, under an alleged authority conferred on that body by 33 Vict. c. 4, passed by the Legislature of New-Brunswick. The by-law in question authorized "the mayor or his deputy, as aforesaid, to demand and receive from any and every such person to whom license shall be granted, as aforesaid, for the use of the Mayor, Aldermen and Commonalty of the said city, the sum of money hereinafter mentioned and specified, according to the following scale, namely :

Professional men, as barristers, attorneys, notaries, physicians, surgeons, practitioners in medicine or any art of healing, dentists, if resident, \$20. If transient persons, not having taken up a residence, \$40.

Wholesale or retail merchants or dealers or traders, forwarding or commission merchants, lumber merchants or dealers, the agents of merchants or traders, express agents, general brokers, manufacturers, apothecaries, chemists and druggists, if resident, \$20. If transient persons, not having taken up a residence, \$40.

Persons not having their principal place of business in this city, selling or offering for sale, goods, wares, and merchandise of any description by sample card, or any other specimen, and the agents of all such persons, \$40.

Persons using any art, trade, mystery or occupation, or engaged in any profession, business or employment within the city, not coming under any of the before-mentioned, if resident, \$20. If transient persons, not having taken up a residence, \$40.

Held, that assuming the Act 33 Vict. c. 4, to be *intra vires* of the Legislature of New Brunswick, the by-law made under it was invalid, because the Act in question gave no power to the Common Council of St. John, of discrimination between residents and non-residents, such as they had exercised in this by-law.

Bethune, Q. C., and MacLaren, for Appellants.
Tuck, Q. C., for Respondent.

DEWE, Appellant, v. WATERBURY, Respondent.

Slander—Public Officer—Privileged Communication.

The appellant, Dewe, having been appointed Chief Post Office Inspector for Canada, was engaged under directions from the Postmaster General in making enquiries into certain irregularities which had been discovered at

the St. John Post Office. After making inquiries, he had a conversation with the respondent, Waterbury, alone in a room in the Post Office, charging him with abstracting missing letters, which respondent strongly denied. Thereupon the assistant-postmaster was called in, and the appellant said: "I have charged Mr. W. with abstracting the letters. I have charged Mr. W. with the abstractions that have occurred from those money letters, and I have concluded to suspend him." The respondent having brought an action for slander, was allowed to give evidence of the conversation between himself and appellant. There was no other evidence of malice. The jury found that appellant was not actuated by ill-feeling toward the respondent in making the observation to him, but found that he was so actuated in the communication he made to the assistant postmaster.

Leave being reserved to enter a non-suit or verdict for the defendant, the verdict was for the plaintiff, and the jury assessed the damages at \$6,000.

Held, on appeal, that the appellant was in the due discharge of his duty and acting in accordance with his instructions, and that the words addressed to the assistant post-master were privileged.

Lush, Q. C., for Appellant.

Tuck, Q. C., for Respondent.

GALLAGHER, Appellant, v. TAYLOR, Respondent.

Marine Policy—Total loss—Sale by Master—Notice of Abandonment.

This was an action brought by the respondent against the appellant, to recover as for a total loss, the amount insured by the appellant, as one of the underwriters, upon a marine policy issued by the Ocean Marine Insurance Association of Halifax, upon the shallop "Susan," belonging to the respondent, alleged to have been totally lost by a peril insured against. The vessel stranded, on the 6th July, near Port George, in the county of Antigonish, adjoining the county of Guysboro', where the owner resided. The master employed surveyors, and on their recommendation, confirmed by the judgment of the master, she was advertised for sale on the 7th July, and sold on the 11th July. The captain had telegraphed to the agents of

the vessel in Halifax, who informed defendant's company, but he did not give any notice of abandonment, and did not endeavor to get off the vessel.

The vessel, valued at \$1,200, insured for \$800, was sold for about \$105 on the 11th July, and was immediately got off, and afterwards used in trading, and carrying passengers.

Held, that the sale by the master was not justifiable, and that the loss was not such a loss as to dispense with notice of abandonment in claiming for a total loss.

Rigby, Q. C., for Appellant.

Gormully and Graham, for Respondent.

CIMON, Appellant, v. PERRAULT, Respondent.

Election Act—Colorable employment by Agent—Acts of Sub-agent—Public Peace.

The charge upon which this appeal was decided was one of bribery by Allard and Tarte, agents of the respondent, Perrault, by payments of money to Bouchard, Boivin, I. Gagnon and J. Gagnon, all of whom were electors. It was proved that Tarte was the respondent's general agent for that part of the country, and that Allard was specially requested and given money by Tarte, and induced by him to advance money to employ a certain number of men, without specifying any particular persons to be so employed, for the alleged purpose of preserving the public peace on polling day. It was not in evidence that Tarte had applied to the proper authorities, or otherwise complied with the law in order to secure the peaceful conduct of the election, but the reason assigned by him for ordering the employment of policemen was that he had received information by telegrams and letters, that roughs were coming down from Quebec to Bay St. Paul to interfere with the voting of the electors. No person came, and the polling took place without any interference. The four persons above named were known to be supporters of the appellant, and swore that they voted for respondent because they had received from Allard the sum of \$2 each.

Held (Taschereau and Gwynne, JJ., diss.) (1) that the respondent was responsible for the acts of bribery committed by Allard, a sub-agent appointed by his general agent. (2) That the employment of a number of men to act as policemen on polling day by direction

of Tarte, without his having previously taken the means provided by law to secure the public peace, was a colorable employment, and therefore respondent, through his agent, Tarte, was guilty of a corrupt practice.

Davidson, Q.C., for Appellant.

Angers, Q.C., & *Pelletier, Q.C.*, for Respondent.

LARUE, Appellant, v. DESLAURIERS, Respondent.

Supreme Court Act, Sec. 4—Right to send back record for further adjudication—Corruption—Insufficiency of return of election expenses—Personal expenses of candidate to be included.

The original petition came before Mr. Justice McCord for trial, and was tried by him on the merits subject to an objection to his jurisdiction. The learned judge, having taken the case *en délibéré*, arrived at the conclusion that he had no jurisdiction, declared the objection to his jurisdiction well founded, and "in consequence the objection was maintained, and the petition of the petitioner was rejected and dismissed."

This judgment was appealed from, and the now respondent, under sec. 48 of the Supreme Court Act, limited his appeal to the question of jurisdiction, and the Supreme Court allowed the appeal.

Held, that Mr. Justice McCord had jurisdiction, and it was ordered that the record be transmitted to the proper officer of the lower Court, to have the said cause proceeded with according to law.

Held, that the Court could not, even if the appeal had not been limited to the question of jurisdiction, have given a decision on the merits, and that the order of this Court remitting the record to the proper officer of the Court *a quo* to be proceeded with according to law, gave jurisdiction to Mr. Justice McCord to proceed with the case on the merits, and to pronounce a judgment on such merits, which latter judgment would only be properly appealable under sec. 48, Supreme Court Act, (Fournier and Henry, JJ., dissenting.)

The charge upon which this appeal was principally decided was that of the respondent's bribery of one David Apelin. During the election canvass, the respondent gave Apelin, at whose house he stopped two or three times, \$5 for the trouble he gave him. Apelin swore it was not worth more than \$1. This amount,

together with other amounts paid out by the appellant during the election canvass, was not furnished to his agent as part of his personal expense, and did not appear in the official statement of the legal expenses of the appellant furnished to the returning officer.

Held, that the candidate is bound to include in the published statement of his election expenses his personal expenses, and as appellant had not included in the said return the said amount of \$5, and Apelin had not earned more than \$1, the payment to Apelin by respondent of \$4 more than was due, was an act of personal bribery.

The judgment of McCord, J., (6 Q. L. R. p. 100) on the other charges was also affirmed.

Langelier, Q.C., for Appellant.

Amyot, for Respondent.

McGreevy, Appellant, v. PAILLE, Respondent.

Answers to Interrogatories—C. C. P. 228, 229.

The Superior Court at Three Rivers, by its judgment, which was confirmed by the judgment of the Court of Queen's Bench, condemned the appellant McGreevy to pay to the respondent the sum of \$3,090.89, for the balance due on the price and value of railway ties made and delivered to the appellant, in accordance with a contract signed by his brother R. McGreevy, and the respondent Paille. In answer to certain interrogatories which referred to all the matters in issue between the parties, the appellant answered, either, "I do not know," or, "I have no personal knowledge."

Held, that such answers are not categorical, explicit and precise, as required by arts. 228 and 229, C. P. C., and that the facts mentioned in these interrogatories must be taken as *pro confessis*, and sufficiently proved the plaintiff's case.

Irvine, Q.C., for Appellant.

Hould, for Respondent.

RYAN, Appellant, v. RYAN, Respondent.

Statute of Limitations—Possession as caretaker—Tenancy at will—Finding of the Judge at the trial.

The plaintiff's father, who lived in the township of Tecumseh, owned a block of 400 acres of land, consisting respectively of lots 1 in the 13th and 14th concessions of the township of

Wellesley. The father had allowed the plaintiff to occupy 100 acres of the 400 acres, and he was to look after the whole and to pay the taxes upon them, but to take what timber he required for his own use, or to help him to pay the taxes, but not to give any timber to any one else or allow any one else to take it. He settled in 1849 upon the south half of lot 1 in the 13th concession. Having got a deed for the same in November, 1864, he sold the 600 acres to one M. K. In December following he moved on the north half of this lot No. 1, and he remained there ever since. The father died in January, 1877, devising the north half of the north half, the land in dispute, to the defendant, and the south half of the north half to the plaintiff. The defendant, claiming the north 50 acres of the lot by the father's will, entered upon it, whereupon the plaintiff brought trespass, claiming title thereto by possession.

The learned Judge at the trial found that the plaintiff entered into possession and so continued, merely as his father's caretaker and agent, and he entered a verdict for the defendant. The evidence showed an entry on the land within the last seven years, and thereby created a new starting point for the Statute, and a new tenancy at will.

Held, that the evidence shows that the respondent at first entered and continued in possession of the land in dispute as agent or caretaker for his father; and he subsequently acknowledged himself to be and agreed to be tenant at will to his father, within ten years; and therefore respondent had not required a statutory title.

Appeal allowed.

King, for Appellant.

Bowby, for Respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, Feb. 15, 1881.

DORION, C.J., MONK, RAMSAY, CROSS, BABY, JJ.
FULLER et al. (plffs. contesting opp. below),
Appellants, & FLETCHER, (oppt. below),
Respondent.

Execution—Second seizure of lands after the Sheriff has returned the first writ and proceeds-verbal of seizure.

This was an appeal from a judgment of the Superior Court at Sherbrooke (Doherty, J.),

Nov. 10, 1879, maintaining an opposition. (See 2 Legal News, p. 388.)

The Sheriff for the District of St. Francis, on the 29th of March, 1878, seized the lands of S. E. Smith, at the suit of the respondent.

On the 21st July following Smith made an opposition to annul the seizure. The sale of the lands seized was suspended by this opposition, which was returned into the Prothonotary's office by the Sheriff on the 13th August, 1878, together with the writ under which the seizure had been made.

On the 29th March, 1879, the Sheriff seized, under a writ of execution issued by the appellants, the same lands previously seized at the instance of the respondent.

On this second seizure the respondent made an opposition to annul the sale, on the ground that the first seizure was still pending, and that a second seizure could not take place of the same lands until the first had been disposed of.

The appeal was from the judgment maintaining this opposition, and declaring the second seizure void.

The Court, (per DORION, C.J.) held that, under art. 642 C. C. P., the existence of a first seizure can prevent a second seizure only when the writ on which the first seizure has been made is still in the hands of the Sheriff. It is not possible for the Sheriff, after he has dispossessed himself of the first writ and *proceeds-verbal* of seizure, to note thereon, as an opposition for payment, any subsequent writ that he may receive. The provisions of C. C. P. 642, 643, suppose that subsequent writs of execution are placed in the hands of the Sheriff before the proceedings on the first seizure have been abandoned or suspended, and while the Sheriff is still in time to proceed to the sale on the advertisements made on the first seizure, and on the day fixed for the sale. Here, the second writ being placed in the hands of the Sheriff long after the day fixed for the sale, and the suspension of the whole proceedings by the return of the first writ, the appellants had no means of compelling the Sheriff to advertise the sale of defendant's lands on the first seizure, nor to fix a day for the sale, except as directed by the second writ.

Judgment reversed.

Brooks, Camirand & Hurd, for Appellant.

Ives, Brown & Merry, for Respondents.

The Legal News.

VOL. IV. MARCH 26, 1881. No. 13.

OUR SUPREME COURT.

Since we wrote on the Supreme Court, on the 5th of March, there has been a debate on Mr. Girouard's bill, and Parliament has adjourned without the measure having obtained the honours of a second reading. What might have been the result of the debate had it not been adjourned, it is impossible to say; but one can hardly imagine that the arguments used on either side could have materially affected the vote. The speakers had evidently, and very properly, determined to avoid the question which was uppermost in every one's mind—the personal composition of the Court. Mr. Brooks alone ventured on the question, but then it was by way of quotation. He read a letter from Mr. Kerr, in which that gentleman frankly expresses the opinion that the Courts in the Province of Quebec "have not the public confidence;" that the Court of Queen's Bench "is not what might be called a strong court;" and that the Supreme Court "is not as strong as it should be." If Mr. Brooks, in the borrowed language of Mr. Kerr, made vocal the opinion of any large portion of the members of the House of Commons, then the Minister of Justice will have his hands pretty full. It may, however, be taken for granted that Mr. Brooks hardly saw the point, or rather want of point, of his quotation. He answers Mr. Girouard in effect: "true, the Supreme Court is a weak and unsatisfactory Court to decide as to the civil law of Lower Canada; but the appeal is from a weak Court." At best this is only the gambler's argument—one throw more of the dice. But if what Mr. Brooks says be true, it is some argument for Mr. Girouard's bill. One weak Court of Appeal is surely more than enough. It is somewhat strange that the speaker put forward to answer Mr. Girouard should have fallen so helplessly into a support of the measure he was ostensibly attempting to demolish. The real word of wisdom of the debate comes to us from Mr. Cameron (Victoria). He thus terminates a temperate speech: "There are interests of a

"far more extensive nature at stake than those
"limited ones to which my hon. friend has
"given expression on the present occasion. If
"the Court is not efficient it ought to be made
"so, but we ought not to adopt a revolutionary
"measure of this nature, which, to my mind, is
"tantamount to the total abolition of this
"Court."

In order to decide as to the mental calibre of a Court there is but one way, and that is to submit its decisions to the criticism of the technically educated. Popular or general views on such points are almost always erroneous. The one thing necessary to subject the decisions of Courts to complete scientific control is faithful reporting. On the heels of the reporter will follow surely the critic, writer or pleader, and the true doctrine will soon prevail over the false. Unfortunately the importance of reporting has not yet impressed sufficiently the minds either of the Bench or Bar. They do not seem to be fully alive to its vast importance, as a protection against misrepresentation, as a recompense for honest labour, as a guide to the prudent practitioner.

It is beyond the scope of this journal to enter into the merits of the judgments of the Supreme Court. With the L. C. Jurist we have endeavored to give, as completely as possible, the full jurisprudence of the Court of Queen's Bench here. When as much is done at Quebec, and when the official reports of the Supreme Court are kept up to date, then, and not till then, there will be a full record on which to build an enlightened judgment as to whether a Court is weak or strong.

R.

JUDICIAL SALARIES.

The article printed on page 33 of this volume directed attention to the arrangement by which the salaries of the Superior Court judges in Ontario are supplemented from provincial funds. Nothing could show more forcibly the impropriety of this system than the answer which Mr. Mowat made in the Legislative Assembly, when a question was put to him on the subject. It was, in effect, that it is cheaper for the Province of Ontario to supplement the Dominion allowance in this way, than to bear its share of the burden which would be imposed on the country, if the judicial salaries generally were placed on a proper basis, and

the whole charge paid by the Dominion. This pretext is utterly indefensible, and looks like persistence in an extremely bad system. It is, moreover, unfair to the Superior Court judges of the Province of Quebec, more especially those residing in the city of Montreal, where the cost of living is probably higher than in Toronto.

We append, from the *Mail* of Feb. 26, the report of what transpired in the Ontario Legislature:—

Mr. Macmaster rose to the notice of motion given by him for "an address to the Lieutenant-Governor for copies of all correspondence between the Government of Ontario and Government of Canada, in pursuance of a resolution of this House, passed during the session of 1879, with a view to have the allowance of \$1,000 a year, paid by the province to the judges of the Superior Courts, assumed by the Dominion." He said that by the constitution of British North America, judges were appointed by the federal Government, and were paid by it. Hence, in his opinion, the \$1,000 allowance was beyond the competency of the Legislature. He held that it was altogether inexpedient that the judges should receive anything whatever from the province. It was dangerous in every sense, reliable as the judges were. The province had no more right to fee the judges than the city of Toronto or any other place. It might be argued that the judges did special service for the province, and should have remuneration. It was argued that without this allowance, suitable and able men could not be got to take the bench; the Dominion allowance being insufficient. He was inclined to doubt this, and at all events it was the business of the Dominion Government, and not of Ontario. Therefore, he moved for the correspondence.

Mr. Mowat said that, as he had already said on a previous occasion, he would inform the House that there was no such correspondence. The resolution of 1879 did indeed express a desire for such communication, but it also expressed the opinion that the good faith of the province was pledged to a continuance to the present judges of the allowance. This resolution was carried by a vote of 55 to 25, in the majority being the present leader of the opposition. The speaker believed that what was then the opinion of the House was its opinion now. As to the competency of the Legislature to pass the Act, the Dominion Government had disallowed it the first year it had passed, but had allowed it to remain unimpugned in its reiteration in the next session, thereby tacitly acknowledging that the Legislature was right. Furthermore, even if the province prevailed upon the Dominion to increase the salaries of Ontario judges, the Government would be obliged to raise the salaries of judges throughout the country, and this would entail such additional expense to the country that Ontario's share of it would far exceed the allowance it now paid directly to the judges.

Mr. Meredith said that the Attorney-General was right in stating that the resolution expressed a cer-

tain opinion, but he had apparently failed to appreciate that the resolution asked that certain correspondence should take place. To this portion of the resolution no attention had been paid. With reference to the question of the allowance, the speaker held that there were grave reasons to question the expediency of the Act providing for it. He hoped that the Attorney-General would at all events see that the full import of the resolution of 1879 was attended to.

Mr. Macmaster said that there could be no doubt of the illegality of making the allowance. The terms of the Confederation Act distinctly showed this. The argument of the Attorney-General ancient expense was begging the question. The Ontario Legislature had no right to supplement the salaries of the judges; the Dominion Government had. It was argued that the judges performed certain services for the province. Why should it not be argued similarly that they could perform services of any kind for anyone, and be paid by anyone, a state of affairs which would speedily upset the whole system of justice. The whole duty of a judge once on the bench was to devote himself to the administration of justice. Any proceeding which tended to trench in the slightest upon the independence of the judges should be done away with at once and for ever. If the correspondence referred to in the resolution for 1879 had not taken place, the sooner it did the better.

Mr. Mowat—It has not taken place.

Mr. Macmaster—Then I withdraw my motion.

ANGLO-AMERICAN COPYRIGHT CONVENTION.

Upon the question of an international copyright, the London *Law Times* has the following:

Her Majesty's Government lately received from the United States Minister here, a draft of a Copyright Convention which has been under the consideration of the United States Government, and on which they desire the views of that of Her Majesty. The Board of Trade have forwarded this draft to Mr. Blanchard Jerrold, as chairman of the English branch of "The International Literary Association," in order that he may call a meeting of English authors and publishers, and take their opinion upon the scheme. The Board of Trade say in their letter that the draft "is not, as they understand, sent in the form of a direct proposal from the United States Government."

The draft convention contains eleven clauses, with all of which it is not necessary for us to deal. Clause 1 gives to English authors the same protection, and for the same number of years, against unauthorized reproduction in America, as they now enjoy in England, and *vice versa* with American authors. A curious proviso says that this protection shall not be

afforded unless the English author has his American edition manufactured in America, so *vice versa* with the English edition of an American book. This proviso does not affect works of art, nor does it prohibit the printing in one country from the stereotypes made in the other. These stipulations "shall also be applicable to the representations of dramatic works and to the performance of musical compositions, of drawing, of painting, of sculpture, of engraving," &c., and other works *ejusdem generis*. There are the usual provisions as to the importation of pirated copies, &c. With regard to registration, the title of English books must in every case be registered in Washington, and that of American books in England before publication, and copies must be deposited in England and the States respectively within three months after publication.

In noticing the provisions of the Anglo-Spanish Convention we pointed out the needlessly burdensome duty imposed by such a registration clause. Again we ask why one registration is not sufficient? Let every American book registered at Washington be protected here forthwith without further registration; and so with English books registered in London. The Board of Trade in their letter suggest the following additions and alterations, which, with all deference, will not, we feel sure, meet with the approval of those most concerned. The first proposed change is salutary enough. It would extend the term of three months to six, within which authors must deposit their books in London or Washington, as the case may be. Then they propose "that the provision requiring the manufacture of books to be in the country of republication be confined to the United States." Further, "that all prints or reprints of books by British authors published with the consent of the author in the United States be freely admitted into the United Kingdom, and into all parts of Her Majesty's dominions." These two proposed alterations we cannot but think unfair to England.

It will be seen that the English printing trade will lose a good deal of work, since English reprints need not be printed in England, while American reprints must be printed in the States; and that, moreover, the Americans are to be allowed to send their reprints over here, while we are prevented from our sending

reprints into America by heavy protective duties. Let one of two things be done: either admit English reprints into America, duty free, as American reprints are to be let into England; or let the sale of reprints be confined to the country where they are published.

We trust that Government will receive advice leading them to abandon the proposed changes, with the exception of that extending the time for depositing copies, and that they will substitute a single registration in the country of first publication for the cumbersome method proposed in the draft. It is a hopeful sign that America should have at length consented to enter into any copyright convention at all; and we feel sure that, in whatever shape Government ultimately concludes the Convention, it will be welcomed by English sufferers, whose name is legion.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

QUEBEC, March 1, 1881.

McLEOD & MASHAM.

Appeal to Privy Council—Sum payable to Her Majesty.

Motion for leave to appeal to the Privy Council, on the ground that there was a part of the sum payable to Her Majesty.

The Court rejected the motion. There was no issue as to the exigibility of the auctioneer's tax.

DEROME & ROBITAILLE et al.

Appeal—Interlocutory judgment.

Motion for leave to appeal *in forma pauperis* from an interlocutory judgment maintaining a *réponse en droit*. Leave to appeal was granted, but no permission was granted to proceed *in forma pauperis*.

QUEBEC, March 3, 1881.

Ex parte BROUSSEAU, petr. for Habeas Corpus.

Habeas Corpus—Jurisdiction of Judge of Sessions.

The petitioner contended that he was imprisoned without authority, the Judge of Sessions of the Peace being appointed by the Lieutenant-Governor.

The Court would not enter upon a question of this sort on *Habeas Corpus*. The Judge of

Sessions was in the open enjoyment of a judicial office, and his quality could not be questioned by every litigant.

Writ refused.

THEIRIN & WADLEIGH.

Appeal—Interlocutory judgment.

Motion for leave to appeal from interlocutory judgments on two motions. The first motion was by plaintiff to correct a clerical error by effacing the words "de Circuit" and replacing them by the word "Supérieure." The other motion, also by plaintiff, was to allow plaintiff to serve defendant with a duly certified copy of the writ, the copy served not being certified. Both these motions were accorded on payment of the costs incurred on the *exception à la forme* previously filed by defendant.

The Court rejected the motion for leave to appeal, with costs.

QUEBEC, March 7, 1881.

KERR & PELTIER.

Procedure—Prohibition—Inscription.

Motion for leave to appeal from interlocutory judgment.

The action began by writ of Prohibition. The parties neglected to observe the delays of procedure of Arts. 1000, 1, 2, 3, & 4, C. C. P. The plaintiff then inscribed his case for evidence with a notice of three days. Defendant made default. Plaintiff then inscribed for proof and hearing, with notice of eight days. These inscriptions were both rejected on motion.

RAMSAY, J., dissenting, thought the judgment of the Superior Court was correct; that the law provided for no such procedure as an inscription in these cases; that the parties having allowed the case to get out of its regular course, it was not competent for either party to fix a new day on which to compel his adversary to proceed, and that this could only be done by the authority of the judge.

CROSS, J., also dissenting, regretted the allowance of the appeal; a remedy might be had without it. In such summary matters no inscription for *Enquête* is necessary. The prosecutor has three days to complete his proof (Art. 1003, C.P.C.), and the defendant two more. The Court or Judge (Art. 1005) can

extend these delays when necessary. Where both parties have neglected these requirements, it has been the practice for one of them to apply to the Court or Judge to fix a day to proceed. By this means the appellant could have had his remedy; true, he has twice inscribed for *Enquête*, and the inscriptions have been set aside on the prosecutor's motion, which has the semblance of a purpose to obstruct. It might have answered every purpose to have treated the inscriptions as notices requiring the prosecutor to proceed. But if the Court or Judge held another course to be more logical or correct (for which there would seem to be reason), it should have been followed. In the circumstances two things are necessary: First, the presence of a Judge; and second, the presence of the parties or the fact of their being duly notified. With these essentials, the fixing of a time by the Judge is the most ready and convenient way of binding the parties to proceed, and would in fact be the most logical and correct course, in exact conformity with the provisions of the Code, and free from objections, allowing the case to be forced on by the simple demand of either party. It is always a delicate matter for the appellate court to interfere in matters of mere discipline, or in what pertains to the domestic forum, justifiable, perhaps, when serious obstacles of form are interposed, but hardly so in cases of mere choice of the form of remedy. It should be avoided when the ends of justice can be attained without such interference. The appeal would seem to be unnecessary.

The majority of the Court (per DORION, C. J.) held that there was no need of any inscription; that the proceedings were summary, and therefore it was presumed that the parties were present from day to day till the evidence was completed. The Judge should have allowed the plaintiff to proceed.

Leave to appeal granted.

QUEBEC, March 8, 1881.

ST. LAURENT V. THE QUEEN.

Indictment for burglary—Conviction, receiving stolen goods.

The plaintiff in error was indicted for burglary, and by the verdict he was convicted of receiving stolen goods knowing them to be

stolen. He was sentenced to be imprisoned in the penitentiary, and was suffering the punishment. He sued out a Writ of Error, and was brought up on *Habeas Corpus* for the argument.

The Court set aside the conviction.

JOSEPH & MURPHY.

Appeal—Interlocutory judgment—Insolvent Act of 1869—Creditor taking consideration for granting discharge.

Action (by respondent) for penalty under Section 149 of the Insolvent Act of 1869 by the assignee. The action alleged that appellant took a promise of payment from one Lemesurier, an insolvent, whose assignee respondent was, as a consideration or inducement to consent to the discharge of such insolvent. Defendant pleaded to the form, setting up that the assignee could not now bring such action. This exception to the form was rejected by the Court below. The defendant therefore asked leave to appeal.

The Court refused leave to appeal, as the point could be better decided on the merits.

SUPERIOR COURT.

MONTREAL, March 10, 1881.

Before TORRANCE, J.

HADLEY V. O'BRIEN, and P. S. O'BRIEN, Opposant.

Procedure—Opposition—Opposant in bad faith.

This was an application by opposant to be allowed to file an opposition to a *ventiditioni exposita* of real estate. He had filed a first opposition on the 16th day before the day fixed for the sale, and the opposition had been rejected on the ground that it was not accompanied by the deed referred to in the opposition and forming the ground thereof.

The facts, shortly, were that plaintiff obtained judgment against the defendant in 1878 for \$12,480, and interest and costs, and took the lands in question in execution on the 25th November. The defendant had given a deed of them to Patrick S. O'Brien, the opposant, on the 19th October, 1880, and the deed was registered on the 9th November.

PER CURIAM. It would be the duty of the Court to come to the aid of the opposant if his

demand were *bonâ fide* and had any chance of being maintained. On this, the parties are referred to *Hans dit Chaussée et ux. v. D'Odé dit d'Orsennens*, 15 L. C. Jurist, 193, in review; Con. Stat. L. C., cap. 47, and C. C. 2074. The lands were hypothecated to the plaintiff, and within six weeks before the seizure by the Sheriff the defendant executed a deed to the opposant. The aim is manifest. It is an obstruction of the course of justice, and could only avail to gain time. The Court cannot grant the motion.

Motion dismissed.

R. A. Ramsay for plaintiff.

J. M. Glass for opposant.

SUPERIOR COURT.

MONTREAL, March 10, 1881.

Before TORRANCE, J.

THE BURLAND-DESBARATS LITHOGRAPHIC CO. V. BEMISTER.

Peremption—Error in certificate of Prothonotary.

PER CURIAM. The demand here was for peremption under C. C. P. 454, *et seq.* The motion was supported by the usual certificate from the prothonotary, but the certificate was informal, and as these proceedings were *de rigueur*, they would here fail. The defendant applying was "George Bemister." The certificate was in a case against "George Benister." The variance was small, but it was fatal.

Motion dismissed.

Lonergan, for plaintiff.

Stephens, for defendant.

SUPERIOR COURT.

[In Chambers.]

MONTREAL, March 10, 1881.

Before TORRANCE, J.

DELISLE V. SANCHE, & LEVY, opposant.

Fol'e Enchère—Application under C.C.P. 690 must be made in Court.

The demand here was for a *folle enchère* under C.C.P. 690 *et seq.* It was made to a Judge in Chambers. It ought to have been made to the Court. Vide C.S.L.C., Cap. 8. S. 18.

Petition dismissed

E. G. Levy, for plaintiff.

COURT OF REVIEW.

MONTREAL, Feb. 23, 1881.

JOHNSON, TORRANCE, JETTÉ, JJ.

[From S.C., Montreal.

McNAMEE et al. v. JONES et al.

Review—Deposit—Several contestations.

Where several contestations have been decided by the judgment inscribed in Review, the inscribing party is bound to make a deposit for each contestant who will be entitled to costs in the event of the judgment being confirmed.

The Court, where the deposit is insufficient, will allow the inscribing party a reasonable delay to increase the deposit to the proper amount.

JOHNSON, J. In this case the defendant moved, the day before yesterday, that the inscription be discharged, on the ground that there were two contestations, and only one deposit.

On that motion we had two things to consider;—1st, whether the further deposit was necessary; and secondly, what was the consequence of its not having been made.

We held on the first point, that as there were two contestations in which each defendant had a right to recover his costs in case he should be successful, each was entitled to have a deposit to look to for that purpose.

As to the second point, we intimated that if it had been asked to increase the deposit, the request would have been granted; and we went further: we said that if the other deposit was made yesterday in office hours, the inscription would stand good, and the effect of the plaintiff's omission in that case, would only be that he would have to pay the costs of the defendant's motion.

We, therefore, reserved our final decision till this morning; and the extra deposit having been in the mean time certified, we reject the defendant's motion to discharge the inscription, and we order that the case be heard in its turn, on its appearing that the deposit is there, and that the costs of the defendant's motion are paid by the plaintiff before hearing.

M. J. F. Quinn, for plaintiffs.

F. X. Archambault, for defendants.

COURT OF REVIEW.

MONTREAL, March 17, 1881.

JOHNSON, RAINVILLE, JETTÉ, JJ.

[From S. C., Montreal.

FAIR ES QUAL. v. CASSILS et al., and CASSILS et al.,
mis en cause.

Rule for Contempt—Service—Delay.

One clear day should be allowed between service and return of a rule for contempt.

The judgment inscribed in review was rendered by the Superior Court, Montreal, TORRANCE, J., Oct. 13, 1880, declaring absolute a rule for contempt against witnesses. (See 3 Legal News, p. 337.)

JOHNSON, J. This is a rule for contempt against witnesses, and it was made absolute, and the parties inscribe that judgment before us.

These gentlemen were in default; they had been duly summoned as witnesses, and did not appear; therefore, up to that time they were in the wrong.

Then the rule was served at 5 p.m. of the 7th, and returned on the 8th, and heard on that day, and judgment was subsequently given making it absolute.

We think we are bound by the practice laid down in review and in appeal, that there should be twenty-four hours' service of a rule of that nature, and we give the parties the benefit of that, and discharge the rule, but, under the circumstances, without costs.

We would also call attention to the form of this rule, which is that the parties should be imprisoned until they shall have given evidence. This is objectionable, as there are no means of taking their evidence in jail, and they would be at the mercy of the party who wished to examine them.

Rule against witnesses discharged, without costs.

R. & L. Laflamme, for plaintiff.

L. N. Benjamin, for defendants.

RECENT CRIMINAL DECISIONS.

Larceny—Idem sonans.—Under a charge of theft of a bank bill a conviction may be had upon proof of theft of a National bank note. Held, also, that the bill being described as issued by the "Chatham National Bank," and

the proof showing that it was issued by the "Chatham National Bank," there was no variance. The rule adopted generally seems to be according to the distinction stated by Lord Mansfield, "that where the omission or addition of a letter does not change the word so as to make it another word the variance is not material."—*Roth v. State of Texas*, 4 Tex. L. J. 393.

Burglary—Intent of Entry.—R. was indicted for burglary with intent to steal. At the trial he offered to prove that the prosecutrix, whose house he entered, was a lewd woman, and that he had had improper intimacy with her; which evidence the Court below refused to admit. *Held*, error. The Court observed: "According to the common-law definition of a burglar, as given us by Lord Coke (3rd Inst. 63), it is 'he that in the night time breaketh and entereth into a mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not.' This definition has been adopted by Hale, Hawkins and Blackstone. One of the elements essential to constitute the crime, according to this definition, is the felonious intent with which the breaking and entry of the house may have been effected. If not with such intent, then the breaking and entry would be, at the common law, nothing more than a trespass. 4 Bl. Com. 227. It was therefore very material, on the question of intent, to show for what object the prisoner broke and entered the house. If he really entered the house solely for the purpose of having illicit connection with the prosecuting witness, he could not be found guilty of burglary."—*Robinson v. State*, 52 Md. 151.

Forgery.—The alteration of an indorsement of money received, made upon the back of a promissory note and not signed, does not constitute forgery, unless it is shown that the indorsement was intended as a receipt for the benefit of the maker of the note; the presumption otherwise being that it was only a memorandum made by the payee for his own convenience.—*State v. Davis*, 53 Iowa, 252.

Homicide—Attempt.—S., having a grievance against W., solicited N. to put poison in W.'s spring, so that the latter would be poisoned, and offered him a reward for so doing. N. refused, and handed the package of poison back

to S. but afterwards discovered it in his pocket. *Held*, that S. could not be convicted of an attempt to commit murder by poisoning.—*Stabler v. Commonwealth*, 2 Crim. L. Mag. 267.

Homicide—Identity.—If the evidence given upon a trial for murder shows that the person killed bore the same names as that alleged in the indictment as the name of the victim, no other proof of identity need be given.—*State v. Kilgore*, 70 Mo. 546.

GENERAL NOTES.

Mr. G. C. V. Buchanan, Q.C., has been appointed a Judge of the Superior Court, in the place of the late Judge Dunkin, (District of Bedford.)

The case of *Castro v. Regina* has gone through all the Courts, and the House of Lords has affirmed the decision of the Court of Appeal, affirming the right to inflict cumulative sentences, on the several counts of one indictment.

The Law Society was harmoniously constituted on Saturday, the 19th instant, and the constitution received at once the signatures of 62 members of the Montreal bar who were present. Dinners monthly and other meetings weekly are part of the programme. A learned counsel is the authority for the statement that the Political Economy club were dined (but not wine) at one dollar per head, and he anticipated that the bar might be catered for on the same terms. Some gourmands may be inclined to consider this a dolorous prospect.

The farewell message of a dying judge was repeated by Sir Henry James in the Court of Appeal, London, on the 1st of November. When the late Justice Thesiger, said the speaker to the members of the Bar, all of whom were standing during his address, was very near his end, "he claimed the attention of one who stood by him and exacted a promise that a message should be taken from him in that to him supreme moment to those who had been his comrades, and he begged that it should be told to them that he had never forgotten, and even in that moment did not forget, the kindness and consideration which he had received from them, and he hoped and trusted that in return he would not be forgotten by them. That message I now give."

"Cheap law" is a poor commodity, but cheap justice is worse. We go to the best lawyer for the best counsels; we would go to the best judge for the purest judgment. We may get justice without giving adequate compensation; but as a rule there is enduring virtue in the Scriptural truism: "The labourer is worthy of his hire." Let us see that the "hire" is adequate. Ask any barrister on the Montreal streets, "Is there a Court to-day?" "Yes; there is Court every day." And so it is—barring Sundays, upon which judges are politely excused from "sitting"—by statute. How often our Canadian judges must sigh for the old English system of assizes—and "terms" that are not

perpetual—but allow an occasional respite from the labours of the Judiciary. There are, as far as I can see, no greater drudges than the members of our city Bench.—*Spectator*.

From a recent discussion in the Ontario Legislature I observe that that Province adds a thousand dollars a year to the salaries paid by the Dominion Government. This is an unconstitutional attempt to recognise that the Judges of the Superior Courts are underpaid. It is unconstitutional, because under the British North America Act the Dominion Government alone can appoint and pay the judges. No Provincial Government should undertake to offer pay to the Judiciary. The Provinces have not the power to illegally dispose of money in such way—and the judge who receives it forgets his obedience to the law he has been called upon to administer. An upright judge should be placed beyond dependence of every kind, and it is not in human nature that a judge may not be influenced by the receipt of an annual income from an unauthorised source. Perhaps the salaries paid by the Federal Government are insufficient. If so, let the Dominion look to it that the hard-worked guardians of liberty and civil right are not overlooked. I cannot see why a Dominion Judge in Toronto should receive a thousand dollars a year more than a Dominion Judge in Montreal.—*Spectator*.

A late number of the *Revue Scientifique*, of Paris, gives some interesting statistics of crime in Europe. Portugal has just published an official report showing that the number of convictions for crimes and misdemeanors of all sorts in that country during the year 1878, was 10,472, or 22 for each 100 inhabitants. The convictions for heinous offences against the person, such as parricides, assassinations and infanticides, were in the proportion of 3·22 for every 100,000 inhabitants. The percentage acquitted and condemned of those accused, for the same year, was as follows:—Acquitted:—France, 20·63; Italy, 24·00; Spain, 25·80; Belgium, 27·20; England, 29·40; Portugal, 37·34. Convicted:—France, 79·37; Italy, 76·00; Spain, 74·20; Belgium, 72·80; England, 70·60; Portugal, 62·66. The greatest number of crimes are committed by persons between the ages of twenty and thirty years. The percentage of convicts who knew how to read stood as follows:—Germany, 95; France, 68; England, 66; Belgium, 61; Italy, 31; Portugal, 30; Spain, 27.

A curious incident lately took place at the Manchester Assizes. During the previous week Mr. Justice Field had sentenced Charles Moores to ten years' penal servitude for putting an obstruction on the Oldham, Ashton, and Guide Bridge Railway. His Lordship on the 2nd inst., some days after the sentence, declared in open court that "a neighboring magistrate had communicated with him, and had taken great pains to investigate the real circumstances of the case." His Lordship said he had, on the strength of the evidence so brought before him, come to the conclusion that the offence was an isolated one, and not the outcome of a criminal mind, so he reduced the sentence to five years' penal servitude. Later on in the day the learned judge informed the public that he had, within the last ten minutes, received "quite authentic information," which satisfied him that the

whole truth had not been told when the remission was applied for. His Lordship therefore restored the original sentence, leaving the parties to apply to the Home Secretary for any remission. We should like to know who was the magistrate who privately "intervened" the judge and kept back part of the truth. And we must add, notwithstanding our great respect for Mr. Justice Field, that a private re-hearing of a case by a judge is not likely to be satisfactory to the public. We should have no objection to a public re-hearing, if the judge in any case thought it necessary.—*Law Times*.

OFFICIAL TRAPS.—Upon the question of official encouragement of the commission of crime, the London *Law Times* refers to the observations of a State Supreme Court, as follows:—

"With reference to the case of Thomas Titley, who fell into a trap set for him by the police, which appears not unlikely to be again brought under public notice, some observations of the Supreme Court of Michigan, *Saunders v. The People*, 38 Mich. 218, are worthy of reproduction. The Court says: 'Where a person contemplating the commission of an offence approaches an officer of the law, and asks his assistance, it would seem to be the duty of the latter, according to the plainest principles of duty and justice, to decline to render such assistance, and to take such steps as would be likely to prevent the commission of the offence, and tend to the elevation and improvement of the would-be criminal, rather than to his further debasement. Some courts have gone a great way in giving encouragement to detectives in some very questionable methods adopted by them to discover the guilt of criminals; but they have not yet gone so far, and I trust never will, as to lend aid and encouragement to officers who may, under a mistaken sense of duty, encourage and assist parties to commit crime, in order that they may arrest and have them punished for so doing. The mere fact that the person contemplating the commission of a crime is supposed to be an old offender, can be no excuse, much less a justification, for the course adopted and pursued in this case. If such were the fact, then the greater reason would seem to exist why he should not be actively assisted and encouraged in the commission of a new offence which could in no way tend to throw light upon his past iniquities, or aid in punishing him therefor, as the law does not contemplate or allow the conviction and punishment of parties on account of their general bad or criminal conduct, irrespective of their guilt or innocence of the particular offence charged and for which they are being tried. Human nature is frail enough at best, and requires no encouragement in wrong-doing. If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation. Desire to commit crime and opportunities for the commission thereof would seem sufficiently general and numerous, and no special efforts would seem necessary in the way of encouragement or assistance in that direction.'"

The Legal News.

VOL. IV. APRIL 2, 1881. No. 14.

SUPREME COURT—GENERAL RULE.

The following general rule was made by the Supreme Court on the 16th March:—

1. That Rule 11 be and the same is hereby amended by striking out the word "immediately" at the beginning of such Rule.

2. That Rule 14 be and the same is hereby amended by striking out the words "one month" therein contained, and by inserting in lieu thereof the words "fifteen days."

3. That Rule 15 be and the same is hereby amended by inserting after the words "and mailing" where they occur in such Rule the words "on the same day," and by striking out the words "in sufficient time to reach him in due course of mail before the time required for service."

4. That Rule 23 be and the same is hereby amended by striking out the words "one month" at the beginning of said Rule, and by inserting in lieu thereof the words "fifteen days."

5. That Rule 31 be and the same is hereby amended by striking out the words "one month" where they occur in said Rule, and by inserting in lieu thereof the words "fourteen days," and by adding at the end of said Rule the words "but no appeal shall be so inscribed which shall not have been filed twenty clear days before said first day of said session without the leave of the Court or a Judge."

6. That Rule 62 be and the same is hereby amended by striking out the words "one month" and by inserting in lieu thereof the words "fifteen days."

7. That Rule 63 be and the same is hereby amended by striking out the words "two weeks" where they occur in said Rule, and by inserting in lieu thereof the words "one week."

In accordance with the changes effected by the above, in any appeal to be brought down for hearing at the Session of the Court beginning on the 3rd of May next, the last day for filing the original case will be the 12th April; for giving notice of hearing and depositing factums the 16th April; and for inscribing the 18th April.

A QUESTION OF COSTS.

A decision of considerable interest to the profession has been recently pronounced by the Court of Review at Quebec. In *Carrier v. Côté*, the parties, before the case was returned into court, came to a settlement which did not provide for the payment of the plaintiff's costs by the defendant, although the declaration prayed for distraction of costs. The plaintiff's attorney, being displeased with this arrangement, gave the defendant notice, that notwithstanding the pretended settlement between him and the plaintiff, he (the attorney) intended to continue the cause for his costs. The defendant was called upon to plead, no plea was filed, and the plaintiff having foreclosed the defendant, proceeded to proof, as if there had been no settlement, and submitted his case. The action was, however, dismissed, on the ground that the settlement of the case was not proved, nor even alleged, to be fraudulent. The case was taken to Review, where the judgment, which was unanimous, was rendered by Chief Justice Meredith. The learned President of the Court, after noticing the case of *Ryan v. Ward* (6 L.C.R. 201), proceeded to observe: "The case, however, to which our attention has been particularly drawn by the learned counsel for the plaintiff is *Montrait & Williams* (1 L.N. 339; 3 L.N. 10; 24 L.C.J. 144) The doctrine which this judgment tends to establish, if I may be permitted to say so, seems to me very reasonable; but it does not prove and has no tendency to prove that after a case has been settled by the parties, the attorney of the plaintiff, without the consent, and against the will of his client, can continue the case in the name of that client, as if no settlement had taken place, so as to enable the attorney to recover his costs from the defendant. The contention that such a course can be adopted is, in my opinion, contrary to the plainest principles of law, and being condemned, as it is, by the judgment of the court below, I think that judgment ought to be confirmed, and I have the less hesitation in arriving at that conclusion because I think the rights of the bar, which doubtless are entitled to our best consideration, are fully, and at the same time justly, protected by the rules laid down by the Court of Appeal in the case of *Montrait & Williams* already mentioned."

We have directed attention to the above

decision because we think there has been a tendency to stretch the doctrine laid down in *Montrail & Williams* beyond what can fairly be inferred from the opinions of the judges who sat in the case. There was evidence in that case sufficient to satisfy the Court that the settlement had been contrived, at the instance of the defendant (who was plaintiff's husband), so as to defraud the plaintiff's attorneys of their costs in a suit which was well founded, and which the defendant was anxious to settle by the payment of a considerable allowance. In *Carrier v. Côté* no fraud was alleged or pretended, and the action had not even been returned, so that there was really no case before the Court at the time of the settlement, and the proceedings taken by the attorney subsequently in the name of the plaintiff were wholly unauthorized, and might perhaps have been disavowed by the client. It is evident that this case also differs essentially from *Laplante v. Laplante*, 3 L.N. 330, in which the plaintiff's demand had been substantially proved before the settlement.

SUPREME COURT DECISIONS.

As nearly as we can discover, the appeals to the Supreme Court from the Court of Queen's Bench in the Province of Quebec, prosecuted to judgment, stand thus:

Montreal.....25

Quebec.....8

Of the former 10 appear to have been reversed, and of the latter 4.

The reversals from Montreal are:

Johnston & St. Andrew's Church, reported 1 S. C. R., p. 235. There is also a special report of the whole case by McGibbon.

Caverhill & Robillard, reported 2 S. C. R., p. 575.

Regina & Scott, reported 2 S. C. R., p. 349.

L'Union St. Joseph & Lapierre, reported 4 S. C. R., p. 164.

Bulmer & Dufresne, not reported.

Reeves & Geriken, not reported.

Ames & Fuller, not reported.

Chevalier & Cuvillier, not reported.

Shaw & McKenzie, not reported.

Regina & Abrahams, not reported

The last three cases are very recent decisions, which explains their not being reported.

The reversals from Quebec are:

Bell & Rickaby, 2 S. C. R., p. 560.

Connolly & Provincial Insurance Co., not reported.

Reed & Levis, not reported.

Desilets & Gingras, not reported.

The last two cases are also recent decisions.

We have thus nine cases, new and old, which have been reversed in the Supreme Court, out of 14, and we know really nothing certain as to the grounds on which they were decided. The short notices which appear in the newspapers, and elsewhere, are rather perplexing than otherwise. An evidence of this may be found in the notes supplied by the reporter to the Supreme Court in the 12th number of the *Legal News* for this year (pp. 89-96.) Notes of four cases are given, and it is to be hoped they are all defective. The first is the case of *Shaw & Mackenzie*. It is said that the ruling of the Court was "that the affidavit was defective; the fact of a debtor, about to depart for England, refusing to make a settlement of an over-due debt, is not sufficient reasonable and probable cause for believing that the debtor is leaving with intent to defraud his creditors." In the first place there was no question as to the sufficiency or insufficiency of the affidavit. In the second place, no one pretended, that refusal to pay an over-due debt, accompanied by departure, was sufficient reasonable and probable cause. What the Court of Queen's Bench held was, that misrepresentation and false excuses, and precarious credit, accompanied by departure, amounted to probable cause. The second is *Abrahams & The Queen*, where it is said it was held "that under the 32 & 33 Vic. c. 29, s. 28, the attorney general has no authority to delegate to the judgment and discretion of another the power which the Legislature has authorized him personally to exercise, that no power of substitution had been conferred, and therefore the indictment was improperly laid before the Grand Jury." This was not the point submitted. Incidentally it was alluded to; but the real question was whether the signatures of the prosecuting counsel were sufficient attestation of the attorney general's direction.

The third case is that of *Gingras & Desilets* where it is said it was held, "that inasmuch as the damages awarded were not of such an excessive character as to show that the Judge

who tried the case had been either influenced by improper motives or led into error, the amount so awarded by him ought not to have been reduced." (Taschereau, J., dissenting.) It is difficult to suppose that this ruling is a mistake of the reporter. It is too like a bit of English law rudely fitted on to the law of this country by an inexpert mechanic. It is a very fragmentary and imperfect exposition of the English rules as to according a new trial before a jury, and it is not our law at all. No one ever heard of the motives of a judge being a consideration in appeal. Where the appeal is from a Court it is a rehearing, and the appeal Court is not dispensed from looking at the evidence and judging of it independently on its merits. An appeal Court failing to do so would be neglecting its duty. The rule invariably insisted on by the Court of Queen's Bench is that it would look at the evidence; but that it would not disturb the judgment unless it thought the decision absolutely wrong. This is the disposition of our positive law, which in its turn is in accordance with general principle. Sir James Stephen, in an article in "The Nineteenth Century" Review of January last, has thus exposed the difficulty which seems to have embarrassed others besides the majority of the Supreme Court: "First, then, I say, that the full introduction of what is called the one judge system is inconsistent with the maintenance of trial by jury in civil cases. It is surprising to me that this obvious fact should require to be stated, and should apparently have been generally overlooked. It is, however, self-evident. The essence of the one judge system is, that the case is first tried by a single judge, who decides both the fact and the law, and then retried by three judges, who also decide both on the fact and the law. The appeal, in fact, is a rehearing.

"On the other hand, the essence of trial by jury is, that the jury find the facts under the direction of the judge, who tries the case, and that the judges, to whom the appeal lies, do not enter upon the question of fact for the purpose of deciding it, but only for the purpose of considering the correctness of the direction given to the jury by the judge who tries the case, in order to decide whether the matter of fact shall be remitted to another jury."

It would seem, then, that the majority of the

Supreme Court has confused two systems essentially different.

In the case of *Levi & Reed* the Supreme Court appears to have been guided by the same erroneous analogy with the jury trial system.

A complete report of the cases may of course show that the majority of the Supreme Court did not fall into this error, but that they thought that a reasonable *solutum* for a labouring man having the end of his finger crushed in a squabble where he was nearly as much to blame as his adversary, was \$3,000, (more than the principal of the greatest wages he could possibly make, capitalized at six per cent.) The Dominion Government provides the necessary means for supplying full reports; it seems strange that the public does not obtain the full benefit of the expenditure. On a better method let us hope that the government of Quebec will see the necessity of supplying means for complete reports of its local courts, as a necessary part of the administration of justice, for which the local authority has undertaken to provide. R.

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, Nov. 30, 1880.

SICOTTE, TORRANCE, JETTÉ, JJ.

[From S. C., Montreal.

Re DAVID, insolvent, BEAUSOLEIL, assignee, & THE TRUST & LOAN Co., petr.

Sa'e by assignee—Commission payable on the whole price, including the amount of the hypothecs assumed by the purchaser.

The assignee of the insolvent estate of David sold fourteen pieces of immovable property, subject to the hypothecs which existed thereon in favor of the Trust & Loan Company.

The Trust & Loan Company became the purchasers, for the sum of \$5 in addition to the amount of the hypothecs; and the Company now asked that the assignee be ordered to execute a deed of sale to them.

The question was whether the assignee was entitled to his commission on the sum actually received, or on the whole amount of the price, including the hypothecs.

The Court below (Mackay, J.) held that the assignee is entitled to his commission on the whole *prix de vente*.

SICOTTE, J. (*diss.*), was of opinion that the judgment was incorrect, and that the assignee, like the sheriff, is not entitled to commission on any greater sum than the amount actually received.

JERRÉ, J., for the majority of the Court, held that the commission was payable on the *prix de vente*, including the amount of the hypothecs which the purchaser undertakes to pay. This was evidently the case where the purchaser is a third party, and why should it be otherwise when the hypothecary creditor becomes the *adjudicataire*? The commission is allowed as remuneration, and would be illusory where the sale is subject to hypothecs, unless allowed to be charged on the whole price.

Judgment confirmed.

Judah & Branchaud for petitioners.

Geoffrion & Co. for Beausoleil, contesting.

SUPERIOR COURT.

MONTREAL, March 26, 1881.

Before TORRANCE, J.

CHEVRIER v. VACHON et vir.

Practice—Faits et articles—Service.

On the 24th November, 1875, the female defendant obtained from the Court a suspension of the order for *faits et articles* which had been served, requiring her to appear before the Court to answer interrogatories.

The suspension did not fix any time when the plaintiff should be required to make answer.

The defendant now moved the Court that a delay be fixed within which the plaintiff should appear and make answer. Notice of the motion was given to the attorneys of defendants.

J. O. Joseph, for them, objected that the notice should have been served upon the party herself, like the rule for interrogatories, and that the motion should be dismissed.

The Court maintained the objection and dismissed the motion.

Motion dismissed.

Scallon for plaintiff.

J. O. Joseph for defendants.

SUPERIOR COURT.

MONTREAL, March 24, 1881.

Before TORRANCE, J.

Ex parte GAGNON.

Petition of wife of absentee to be authorized to do business as a marchande publique.

The petitioner, Dame Emelie Gagnon, of Montreal, was a married woman separated as to property from her husband, David Godin, an absentee. She represented him to be an absentee gone to parts unknown, and prayed that she be authorized to do business as a *marchande publique*, and so earn a living for herself and only child.

The petition was granted, and the Judge referred to 1 Marcadé on C. C. Nap. 220, n. 739.

Petition granted.

J. O. Turgeon for petitioner.

SUPERIOR COURT.

MONTREAL, March 15, 1881.

Before TORRANCE, J.

LORANGER, Atty. Gen., v. DORION et al.

Acting as a corporation—C.C.P. 997.

This was a petition under C.C.P. 997 to have the defendants restrained from acting illegally as a corporation under the name of the Silver Plume Mining Company.

Two of the defendants, Doucet and Marshall, alleged specially by separate pleas that when the petition was served on them (17th November, 1880) they had no connection with the Company, either in the capacity of director or stockholder, and held no office therein. In other respects the pleas of Doucet and Marshall were similar to those of the three other defendants who had pleaded (Dorion, Masson and Boyd).

The plea was to the effect that the Company was a private association, which the defendants never represented to be a corporation; that the relator, W. F. Lighthall, knew it to be a private association, and, moreover, by purchasing the stock of the association, he had himself become a member.

The facts were that on the 17th April, 1880, Dorion, one of the defendants, with Bickerdyke and Matheney, appeared before Mr. Hart, N.P., and declared that they owned two certain min-

ing lots in Dakota Territory, U.S., in the proportion of 6-10 to Dorion, 3-10 to Bickerdyke, and 1-10 to Matheney, under a deed of sale before Doucet, N.P., on the 10th March, 1880, and had associated themselves for the purpose of carrying on the business of mining under the name of the Silver Plume Mining Company, according to the rules and regulations attached to the deed. The property cost \$15,000, and was taken as representing a capital of \$1,000,000, paid-up, divided into 10,000 shares. Thereupon Dorion transferred to Charlebois and Doucet, who intervened, ten shares and one share respectively, to qualify them; and the Company was organized, Dorion becoming President, Charlebois Vice-President, and Doucet Secretary. Under the constitution and by-laws annexed to the deed, article 22, the stock of the Company was to be issued to a trustee, who was to sign all transfers and certificates to shareholders. Under article 5, to constitute membership, there must be subscription and ownership appearing by the books of the Company. By article 1, the Company was to be a corporation, and under article 7 it was to have a corporate seal. The minutes of the meeting of the Company, produced by Mr. Doucet on his examination as witness for petitioner, showed that the first thing done was to decide upon the shape of a corporate seal. Mr. Dorion, as president of the Company, would then appear to have issued certificates with the corporate seal, mentioning the number of shares which each represented, and those certificates were accompanied by a printed transfer containing the name of the transferee in blank, which was signed by Mr. Dorion as trustee. In this way these certificates could be transferred from hand to hand until some one desired to become an actual and regular shareholder, when, under the conditions in the printed form of transfer, he was to exchange his certificate from the President as trustee for certificates to be signed by the Secretary, and registered in the books of the Company.

PER CURIAM. The Court has no difficulty in deciding this case. The constitution of the Company shows it to be a corporation. It has a corporate seal. It has a board of directors with power to make by-laws. All these circumstances show that the defendants have assumed to act as a corporation. In England it

has been a question whether assuming to act as a corporation was an offence at common law. There have been conflicting decisions there, and Lindley—Partnership—summing up, p. [153] of American edition of 1860, says, "it is by no means clear that it is illegal at common law to assume to act as a body corporate." But our Code of Procedure is clear, 997: "Whenever any association or number of persons acts as a corporation without being legally incorporated or recognized, &c., it is the duty of Her Majesty's Attorney-General for Lower Canada to prosecute in Her Majesty's name such violation of the law," &c. Lindley says: "What distinguishes corporations from other bodies is their independent personality, and no society which does not arrogate to itself this character can be fairly said to assume to act as a corporation." The converse may be said, that a society which arrogates to itself this character of independent personality does assume to act as a corporation. At p. [148] he says:—"With respect to acting or presuming to act as a body corporate, considerable difficulty was felt as to the meaning of the words. It was held in *R. v. Webb* that having a committee, general meetings, and power to make by-laws, was not unequivocally assuming to act as a body corporate; but in the later case of *Joseph v. Pelsner* the Court was of a different opinion. To create transferable shares in a common stock has also been said to amount to assuming to act as a body corporate, although only such bodies corporate as are specially empowered so to do can lawfully possess stock, the shares in which are transferable." In the present case, we have, in addition, the declaration that the company was a corporation and in the possession of the corporate seal.

It is right then that the conclusions of the Attorney-General should be granted. It remains to say against whom the judgment should go. There is no question as to Dorion, the President, Boyd and Masson, the Directors, and Doucet, the Secretary. A question has been raised as to the liability of Marshall. He resigned his office of director on the 6th of October, and it was accepted on the 7th of October and notified to him on the 13th. But he is a shareholder and owner of scrip, for his offer to the company of his shares does not appear to have been accepted, and the Court

does not see that he can escape condemnation any more than the others. He was elected director for a year in June, and there was no publication of his resignation.

Judgment for plaintiff.

E. Barnard, for Attorney-General.

T. W. Ritchie, Q.C., for defendants.

SUPERIOR COURT.

MONTREAL, July 9, 1879.

Before MACKAY, J.

EVANS v. LIONAIS, es qual. & DOUCET, T.S.

Créancier saisissant—Tiers et ayant cause—Acte sous seing privé.

Le demandeur Evans, en exécution d'un jugement obtenu en sa faveur contre Hardoin Lionais, es qualité, a fait pratiquer une saisie-arrest après jugement entre les mains de Alexis Doucet, lequel déclara ne rien devoir au défendeur es-qualité.

Le demandeur contesta sa déclaration sur le principe qu'il occupait une maison appartenant au dit défendeur es-qualité, et qu'il payait \$15 de loyer par mois.

A cette contestation, Alexis Doucet répondit qu'en effet il avait un bail avec le défendeur, es-qualité, mais que le dit défendeur l'avait chargé de payer le dit loyer à son acquit à J. D. E. Lionais, ce que ce dernier avait accepté, et que, par conséquent, il ne devait rien.

Le demandeur fit à l'encontre de ce plaidoyer une réponse en droit, alléguant que le dit acte est un acte sous seing privé qui, n'ayant aucune des qualités requises par la loi, pour donner contre les tiers une date aux écritures privées, est nul et de nul effet contre les créanciers du dit défendeur. (C. C., art. 1225).

La cause étant inscrite sur cette réponse en droit, le tiers-saisi prétendit à l'argument que le créancier n'était pas un tiers vis-à-vis du tiers-saisi, mais était son ayant-cause, que par conséquent le bail, quoique sous seing privé, pouvait être opposé au demandeur. (C. C., art. 1222).

La Cour a maintenu la réponse en droit du demandeur à l'exception péremptoire plaidée par le tiers-saisi, Alexis Doucet.

E. Barnard, avocat du demandeur contestant.

P. Moreau, avocat du tiers-saisi.

RECENT DECISIONS AT QUEBEC.

Assault—Defence, mutiny—A sailor on a merchant ship brought an action of damages for assault, against the owner and master. The defence was that the seaman had refused to perform the duty assigned to him, and when an attempt was made to put him in irons, he resisted and was mutinously supported by others of the crew. The master was knocked down, whereupon the owner came to his assistance and struck the plaintiff with a cutlass. G. Okill Stuart, J., in the Vice-Admiralty Court, Quebec, referred to the opinion of Lord Stowell in the case of the *Agin-court* (1 Hagg. 271), "that in a case of gross behavior the master of a merchant ship has a right to inflict corporal punishment on the delinquent mariner. The mode of correction may be not only by personal chastisement but by confinement or imprisonment on board the ship. The extent of the punishment must depend upon circumstances. In general deadly weapons cannot be employed. But cases of necessity may justify the use of them." In the present case, the owner of the vessel, with a defiant and mutinous crew before him, and the authority of the master subverted, acted with energy and decision, and his conduct was justifiable.—Action dismissed.

—*The Bridgewater*, 6 Q. L. R. 290.

Security for Costs—Power of attorney.—1. D'après l'article 120 du code de procédure, le cautionnement *judicatum solvi* peut être demandé aussi bien par motion que par exception dilatoire.—*Mitchell v. Flanagan*, 6 Q. L. R. 295. (Cour de Circuit, jugement par Caron, J.)

2. Le délai pour produire l'exception dilatoire, basé sur le fait que le demandeur qui réside hors la province n'a pas produit une procuration de sa part, ne compte que du jour où le cautionnement a été fourni.—*Id.*

Promissory Note—Demand of payment.—Dans une action sur billet à demande, la simple demande de paiement par n'importe qui, même sans montrer le billet et sans l'avoir, est une mise en demeure suffisante en loi.—*Marchette v. Falardeau*, 6 Q. L. R. 296. (Cour de Circuit, jugement par Casault, J.)

Attorney—Costs.—The parties, before the case was returned into Court, came to a settlement which did not provide for the payment of the plaintiff's costs by the defendant, although the declaration prayed for distraction of costs.

Held, that the plaintiff's attorney could not continue the case for his costs.—*Carrier v. Cott*, 6 Q. L. R. 297 (Court of Review, opinion by Meredith, C.J.)

Collision—Negligence.—In the case of a steam vessel lying at anchor upon an anchorage ground while using her bell and showing two white lights, one upon her foremast and the other at the gaff aft, each in an oblong lantern: *Held*, 1. That a sailing vessel which, misled by the whistle of another steamer in motion, struck her, was in fault for going too fast; and 2. That the lights, though not in globular lanterns, as directed by the "Act respecting the navigation of Canadian waters," being equal in power, were a substantial compliance with the Act.—*The General Birch*, 6 Q. L. R. 300. (Vice-Admiralty Court, opinion by G. Okill Stuart, J.)

Lease—Right of tenant to resiliate, in consequence of interference with light.—L'auteur des défendeurs avait loué au demandeur une maison pour y établir un atelier de photographie. Plus tard les défendeurs érigèrent sur une propriété avoisinante à eux appartenant, un mur de 22 pieds qui a effet d'enlever au demandeur partie de la lumière dont il avait besoin pour exercer son métier. *Jugé*, que l'érection du mur en question constitue pour le locataire un trouble dans sa jouissance, et lui donne droit à la résiliation du bail et à des dommages contre les représentants de son locateur.—*Remillard v. Cosas*, 6 Q. L. R. 305 (Cour Supérieure, jugement par Casault, J.)

Capias—Bail.—A defendant who has given special bail is not bound to file a statement and make the declaration mentioned in Art. 766 C.C.P.—*Poulet v. Lanière*, 6 Q. L. R. 314. (Superior Court; judgment by Meredith, C.J.)

Sale—Registration—Commencement of proof.—L'acquéreur d'un immeuble, n'y ayant pas de droits incommutables et effectifs sans un titre et son enregistrement, est présumé faire dépendre son consentement de l'existence d'un titre, et en conséquence, il faut, pour trouver dans un écrit le commencement de preuve d'une acquisition verbale d'un immeuble, une énonciation plus formelle et plus positive que pour un contrat qui n'a besoin que du consentement des parties pour le compléter.—*Anctil v. Déchêne*, 6 Q. L. R. 317 (Cour de Révision; opinion par Casault, J.)

RECENT ENGLISH DECISIONS.

Master and Servant—Assault—Consent—Submission.—The plaintiff was a domestic servant in the service of Captain and Mrs. Braddell. In consequence of a suspicion entertained by Mrs. Braddell, she sent for her doctor, Dr. Sutton, and requested him to make an examination of the plaintiff's person, to ascertain whether she was pregnant. The doctor did so, without using any force or doing anything more than was necessary for the purpose of the examination. The plaintiff strongly expressed her dislike to be examined, but offered no further resistance, and did what the doctor told her. She afterwards brought an action for assault against her master and mistress and the doctor. The judge at the trial withdrew the case from the jury as against the master and mistress, and the jury found a verdict for the other defendant, Dr. Sutton. A rule was subsequently obtained to set aside the verdict and grant a new trial, on the ground that the judge ought not to have withdrawn the case from the jury against any of the defendants, and that the verdict was against the weight of evidence. The case came before Lindley and Lopes, JJ. (Common Pleas Division, Jan. 15, 1881) who differed in opinion.

Held, by Lopes, J., (1) That it was not correct to tell the jury, that to maintain the action, the plaintiff's will must have been overpowered by force or the fear of violence. A submission to what is done, obtained through a belief that the plaintiff was bound to obey her master and mistress, is a consent obtained through fear of evil consequences to herself, induced by her master and mistress' conduct, and is not sufficient. (2) That the action is maintainable unless what was done was so unmistakably with the plaintiff's consent, that there was no evidence of non-consent upon which a jury could reasonably act. *Held*, by Lindley, J., (1) That a verdict in the plaintiff's favor could not be supported in point of law against her master and mistress. (2) That the plaintiff had it entirely in her own power physically to comply or not with her mistress' orders. (3) That there was no evidence of want of consent as distinguished from reluctant obedience or submission to her mistress' orders, and that in the absence of all evidence of coercion as distinguished from an order which the plaintiff could

comply with or not as she chose, the action could not be maintained.

Lopes, J., said: "I know not what more a person in the plaintiff's position could do, unless she used physical force. She is discharged without a hearing; forbidden to speak; sent to her room; examined by her mistress' doctor, alone, no other female being in the room; made to take off all her clothes and lie naked on the bed; she complains of the treatment; cries continually; objects to the removal of each garment; and swears the examination was without her consent. Could it be said in these circumstances her consent was so unmistakably given that her state of mind was not a question for a jury to consider. I cannot adopt the view that the plaintiff consented because she yielded without the will having been overpowered by force or fear of violence. That, as I have said, is not, in my opinion, an accurate definition of consent in a case like this. I do not understand why, if there was a case against the doctor, there was none against Captain and Mrs. Braddell. The doctor was employed to see if the plaintiff was in the family way. The plaintiff does not suggest in her evidence that he did more than was necessary for ascertaining that fact. If this is so, the Braddells are responsible for what was done by the doctor. It is said there ought to be no new trial as against the doctor. I cannot agree with the definition of consent given by the learned judge, and I think the withdrawing the case against the Braddells influenced the jury in finding for the doctor. They would naturally think the doctor only did what he was told; the Braddells put him in motion, and it would be hard when the principals are acquitted to find the agent guilty. There should be a rule absolute for a new trial." Lindley, J., said: "The plaintiff had it entirely in her own power physically to comply or not to comply with her mistress' orders, and there was no evidence whatever to show that anything improper or illegal was threatened to be done if she had not complied The plaintiff was not a child; she knew perfectly well what she did, and what was being done to her by the doctor; she knew the object with which he examined her, and upon the evidence there is no reason whatever for supposing that any examination would have been made or attempted if she had told

the doctor she would not allow herself to be examined." The Court being divided in opinion, the rule was discharged.—*Latter v. Braddell & Wife, & Sutton*, 43 L.T. (N.S.) 605.

Contract—Restraint of Trade—B. and L., carrying on business as ironmongers in partnership, agreed that the partnership should be dissolved; that the stock and good-will should be taken by L., who would continue the business on his own account; and that B. would retire from the business, and not commence business as an ironmonger in Bradford, or within ten miles thereof, for ten years (except in Leeds, in which case he should not do business in Bradford directly or indirectly.) The defendant within the ten years commenced business as an ironmonger at Leeds, and solicited customers of the old firm. *Held*, that an injunction ought to be granted only to restrain the defendant from soliciting the customers of the old firm, but not to restrain him from dealing with them. If parties made an executory contract, which is to be carried out by a deed afterwards executed, the real completed contract is to be found in the deed, and the former contract can only be looked at for the purpose of construing the deed.—*Laggott v. Barrett*, Court of Appeal, 43 L.T. Rep. (N.S.) 641.

GENERAL NOTES.

The Law Society, on the 26th March, proceeded to the election of office-bearers, which resulted as follows:—President, the *Batonnier*; Vice-President, T. W. Ritchie; Treasurer, S. Pagnuolo; Secretary, F. L. Beique; Committee, Hon. R. Lafamme, J. M. Loran-ger, J. J. Curran, C. P. Davidson, C. A. Geoffrion.

WILLS.—In the House of Lords, Lord Brougham once mentioned two somewhat remarkable facts, showing the necessity of having a safe place for the deposit of wills. The first case was one in which one of his noble friends, as heir-at-law, lost, and another of his noble friends, as a devisee, gained £30,000 a year. How the first lost it, and the last gained it, was by a will being found in an old rusty box in an old travelling carriage, and which, therefore, might have been very naturally lost by accident or destroyed from ignorance. The second case was one also in which some of his noble friends were concerned, and the sum in question was no less than £160,000. This sum would have been entirely lost to the purposes for which it was intended, if the inquiries relative to the existence of a will with respect to it had been instituted in the winter instead of in the summer. The will was searched for, everywhere, but could nowhere be found, until at last it was discovered in a grate, and stuffed like a piece of waste paper through the bars. If it had been winter instead of summer, in all probability when the fire had been lighted it would have been destroyed.

The Legal News.

VOL. IV.

APRIL 9, 1881.

No. 15.

CHANGE OF JUDICIAL SYSTEM.

Expedition is popularly associated with superior ability, and it is true no doubt that work rapidly done is often excellently done. But Sir Watkin Williams, in a recent address referring to the changes in the judicial system of England, held up the other side of the shield. In the "good old days," as they were called, of Lord Ellenborough and Lord Abinger, it was the boast of the judges that they could despatch thirty-five causes in a day; "they, in fact, crushed through a cause list like an elephant through a rice plantation. Law was dissociated from justice and right, and became a common by-word for absurdity and wrong." "Unintelligible technicalities," he added, "were now being rapidly swept away; causes were thoroughly tried on their merits; but in place of hours they occupied days; they were more open to popular criticism on their merits, and appeals were multiplied. One thing, at least, was certain,—that there was now a more thorough attempt to do real justice as well as to administer mere law."

Another change that will probably soon be demanded is the reduction of solicitors' costs. Litigation in England is doubtless greatly restricted by the enormous charges which attorneys pile up, to the ruin of the unsuccessful litigant at least, if not both parties. "There are certain well-known firms of solicitors," says one English journal, "who can never be got to render a statement. They are perpetually applying for cheques on account, and generally have the faculty of asking for these at some critical time in the procedure, when they know that the litigant cannot help paying, in order that his case may go on. Other solicitors punish the inquisitiveness of any who may wish for a detailed bill of costs, by making it out to an extent vastly in excess of the round sum originally demanded."

The attorneys, however, have always presented an unbroken front to any assault upon their cherished privileges. Some of our readers may remember Brougham's outburst when the

attorneys assailed him on account of his bill for the establishment of local jurisdiction: "Let them not lay the flattering unction to their souls," he exclaimed, "that I can be prevented by a combination of all the attorneys in Christendom, or any apprehensions of injury to myself, from endeavoring to make justice pure and cheap. These gentlemen are much mistaken if they think I will die without defending myself. The question may be whether barristers or attorneys shall prevail; and I see no reason why barristers should not open their doors to clients without the intervention of attorneys and their long bills of costs. If I discover that there is a combination against me, I will decidedly throw myself upon my clients—upon the country gentlemen, the merchants and manufacturers—and if I do not with the help of this House beat those leagued against me, I shall be more surprised at it than at any misadventure of my life."

FINDING LOST GOODS.

A singular case between loser and finder, *Felton v. Gregory*, was recently disposed of by the Supreme Judicial Court at Boston. (The judgment appears in the *Massachusetts Law Reporter*, Feb. 9, 1881.) The plaintiff found a pocket-book containing \$350, which had been lost by the defendant. Four days afterwards, the loser advertised a reward of \$200 for the return of the pocket-book, and the plaintiff, on production of the article, received the reward. It appeared that the loser's name was written in the book, and he could easily have been found. After paying the money, the loser of the book brought a criminal complaint against the finder (under Gen. Sts., c. 79, § 1), for not returning the lost property immediately, without waiting for the reward; whereupon the finder, alarmed at the prospect of imprisonment, paid back the reward, but subsequently instituted an action to recover the money, on the ground that he had paid it under duress. The Court decided that there was no duress, the only coercion influencing the mind of the finder in this case being the fear of the consequences of his own criminal act.

STOPPING THE SUPPLIES.

A curious provision has been introduced into the Constitution of the State of California. It reads as follows: "No judge of a Superior

Court, nor of the Supreme Court, shall after the first day of July, 1880, be allowed to draw or receive any monthly salary, unless he shall take and subscribe an affidavit, before an officer entitled to administer oaths, that no cause in his court remains undecided that has been submitted for decision for the period of ninety days."

It has been decided, under this provision, that the failure to make an affidavit does not work a forfeiture of the salary, but that arrears may be claimed as soon as the law has been complied with. The legislators of the Pacific Coast have certainly a practical method of law-making.

NOTES OF CASES.

SUPREME COURT OF CANADA.

OTTAWA, 1881.

POWER V. ELLIS.

Witness—Refusal to answer questions on cross-examination—Privileged communications—Misdirection.

Plaintiff (respondent on appeal), a teller in a bank in New York, absconded with the funds of the bank, and came to St. John, N.B., where he was arrested by the defendant (appellant on appeal), a detective residing in Halifax, N.S., and imprisoned in the police station for several hours. No charge having been made against him, he was released. While plaintiff was in custody at the police station, the defendant went to the plaintiff's boarding house, and saw his wife, and read to her a telegram, and demanded and obtained from her the money she had in her possession, telling her that it belonged to the National Bank and that her husband was in custody.

In an action for assault and false imprisonment, and for money had and received, the defendant pleaded *inter alia*, that the money had been fraudulently stolen by the plaintiff, at the city of New York, from the National Park Bank, and was not the money of the plaintiff; that defendant, as agent for the Bank, and acting for the Bank, received the money to and for the use of the Bank, and paid it over to them.

Several witnesses were examined, and the plaintiff, having been called as a witness on his behalf, did not, on cross-examination, an-

swer certain questions, relying, as he said, upon his counsel to advise him, and on being interrogated as to his belief that his doing so would tend to criminate him, he remained silent, and on being pressed he refused to answer whether he apprehended serious consequences if he answered the questions. The judge then told the jury that there was no identification of the money, and directed them that if they should be of opinion that the money was obtained by force or duress from plaintiff's wife they should find for the plaintiff.

Held (Henry, J., dissenting), that the defendant was entitled to the oath of the party that he objected to answer because he believed his answering would tend to criminate him.

Per Gwynne, J., that there was misdirection in this case.

Barker, Q.C., for the appellant.

Weldon, Q.C., for the respondent.

TEMPLE V. NICHOLSON et al.

Bill of sale—License to grantee to take possession—Progeny—Trover.

Trover. The declaration charged the appellant with the wrongful conversion of a horse and colt, the property of the respondents.

The defendant pleaded, *inter alia*, that the colt was the property of one Thomas Hackett, and the defendant, as Sheriff of York, took the same under an execution against Hackett.

The plaintiffs claimed the property was vested in them by a mortgage bill of sale, and given to them by Hackett as collateral security with other mortgages which they had on his real estate.

The colt was the progeny of a mare which was mentioned in the bill of sale, and which always remained in the possession of Hackett. In the mortgage there was a proviso that until default said Thomas Hackett might remain in possession of all the property mortgaged or intended so to be; but with full power to the plaintiffs, in default of payment, to take possession and dispose of the property as they would see fit. At the time the colt was foaled it was proved that there had been default in payment both of principal and interest money secured by the chattel mortgage.

Held, that the plaintiffs, being under the bill of sale the absolute owners of the mare, and after default entitled to take possession of her,

and the foal having been dropped while plaintiffs were such owners and entitled to the possession of the mare, the colt was their property,—“*Partus sequitur ventrem*.”

Gregory for appellant.

Welmore, Q.C., for respondents.

COURT OF QUEEN'S BENCH.

MONTREAL, JANUARY 25, 1881.

DORION, C.J., MONK, RAMSAY, CROSS, BABY, J.J.

FLETCHER (plff. below), Appellant, & THE MUTUAL FIRE INSURANCE CO. FOR STANSTEAD & SHERBROOKE COUNTIES (defts. below), Respondents.

Procedure—Motion in arrest of judgment to be made before Court of Review.

The appeal was from a judgment of the Superior Court, at Sherbrooke, granting a motion for a new trial.

The action was brought for \$800, amount of respondent's policy, and the case being tried before a special jury, the appellant obtained a verdict for \$600.

The respondents then gave notice of three motions, one asking for a new trial, a second in arrest of judgment, and the third for judgment *non obstante veredicto*.

The second of these motions—that in arrest of judgment—was presented to the Superior Court at Sherbrooke, and was granted. It was from this judgment that the present appeal was taken. (The other two motions, according to the notice, were to be presented before the Court of Review at Montreal).

The appellant, among other grounds, contended that the Court, consisting of one judge, could not legally adjudicate upon a motion in arrest of judgment.

The appeal was maintained, and the judgment reversed unanimously. The judgment reads as follows:—

“Considering that under Art. 423, C.C.P., as amended by 34 Vict. ch. 4, sect. 10, and by 35 Vict. ch. 6, sect. 13, and under the provisions of Art. 424, all motions for new trial, for judgment *non obstante veredicto*, and in arrest of judgment, must be made before three Judges of the Superior Court sitting in Review, and that a single Judge sitting in the Superior Court

had no jurisdiction to hear and adjudicate on the motion in arrest of judgment made in this cause;

“And considering further that the said motion in arrest of judgment is not based on any of the grounds for which a motion in arrest of judgment can be made;

“And considering that there is error in the judgment rendered by the Superior Court sitting at Sherbrooke on the 20th of November, 1878;

“This Court doth reverse the said judgment of the 20th November, 1878, and doth reject the said motion in arrest of judgment, and doth condemn the respondents to pay to the appellant the costs incurred as well on the said motion as on the present appeal, and the Court doth order that the record be remitted to the Court below, in order that such further proceedings may be had as to justice may appertain.”

Judgment reversed.

Ives, Brown & Merry for appellant.

Brooks, Camirand & Hurd for respondents

COURT OF QUEEN'S BENCH.

MONTREAL, JANUARY 27, 1881.

DORION, C. J., MONK, RAMSAY, CROSS, BABY, J.J.

THE CORPORATION OF THE VILLAGE OF VERDUN (plff. below), Appellant, and LES SEIGNEURS DE LA CONGREGATION NOTRE DAME DE MONTREAL (defts. below), Respondents.

Art. 712, Municipal Code—Exemption from Taxation—Religious and Educational Institutions—Property not possessed solely to derive a revenue therefrom.

The appeal was from a judgment of the Superior Court, Montreal, Johnson, J., Dec. 20, 1878, which will be found reported in 1 Legal News, p. 619.

The question was whether the respondents' property, Ile St. Paul, was exempt from municipal and school taxes.

Exemption was claimed under Art. 712, Municipal Code, which reads as follows: “The following property is not taxable: 3. Property belonging to *fabriques*, or to religious, charitable or educational institutions or corporations, or occupied by such *fabriques*, institutions or corporations for the ends for which they were established, and not possessed solely by them to derive a revenue therefrom.”

The property in question, which comprises about 800 acres, and is situate in the River St. Lawrence, at the foot of the Lachine rapids, was given to the respondents over a century ago, for educational purposes. They maintain an establishment on the Island, and nuns who are sick or who require repose are sent thither for health and relaxation. Two thirds of the land is arable and the rest wooded, and it appeared that the produce was consumed either at the establishment on the Island, or at the parent institution in the City of Montreal.

The appellants claimed that the property was possessed solely to derive a revenue therefrom, and did not fall within the exemption. It was further contended, as regards the school taxes, that the exemption is limited to the buildings set apart for purposes of education, and the grounds or land on which such buildings are erected. Here the property was a large farm, and the buildings did not cover more than six acres.

The Court below dismissed the action for the recovery of taxes on the following grounds:—

“Considering that by law, to wit: Article 712 of the Municipal Code, the defendants are not liable to pay to the plaintiffs the sums demanded; that by paragraph 3, of the said Art. 712, property belonging to *fabriques*, or to religious, charitable, or educational institutions or corporations, or occupied by such for the purposes for which they were established, and not possessed solely by them to derive a revenue therefrom, is not taxable;

“Considering that the defendants’ property, which has been taxed for the amount now sought to be recovered, belongs to them, and is occupied by them as a charitable and educational corporation for the ends for which they were established, and is not possessed by them solely to derive a revenue therefrom; the plea of the said defendants is maintained, and the plaintiff’s action is dismissed, with costs, *distracts*,” &c.

In appeal the judgment was confirmed, Dorion, C.J., and Cross, J., dissenting.

D. Macmaster for Appellants.

Lacoste & Globensky for Respondents.

COURT OF QUEEN'S BENCH.

MONTREAL, January 25, 1881.

DORION, C. J., MONK, RAMSAY, CROSS, BABY, JJ.

LA BANQUE JACQUES CARTIER (def. below), Appellant, & BEAUSOLEIL es qual. (plff. below), Respondent.

Insolvent Act of 1875, Sect. 68—Action by creditor—Proof of claim.

The appeal was from a judgment of the Court of Review at Montreal, July 9, 1879, reversing a judgment of the Superior Court, Jetté, J., Dec. 21, 1878. (For the judgment of the Court of Review see 2 Legal News, p. 253.)

The action was brought under Sect. 68 of the Insolvent Act of 1875, in the name of the assignee to the estate of one Champagne, an insolvent, to recover a sum of \$320.

The facts were that a writ of attachment was, on the 27th April, 1877, issued against the estate of Champagne at the instance of the Bank (now appellant), but before the day fixed for the return of the writ Champagne paid the amount (\$320), and thereupon the Bank dropped the proceedings in insolvency. Five days after the first writ issued, another writ of attachment was issued against the estate of Champagne, at the instance of Stirling, McCall & Co., other creditors of Champagne, and Beausoleil in due course was appointed assignee.

The assignee having declined to take proceedings to recover back the \$320 paid to the Bank as above mentioned, the present suit was instituted by Stirling, McCall & Co., in the name of the assignee, as permitted by Sect. 68 of the Insolvent Act of 1875.

The Superior Court dismissed the action on the following grounds:—

“Considérant que la présente action est intentée contre la défenderesse au nom du demandeur ès-qualité de syndic à la faillite du nommé Rémi Champagne, pour faire remettre et payer par la dite défenderesse une somme de \$320, que le demandeur ès-qualité allègue avoir été reçue par la défenderesse dans les trente jours qui ont précédé la faillite du dit Champagne, et lorsqu’il était déjà, à la connaissance de la défenderesse, en état d’insolvabilité complète, ce qui, aux termes de la clause 134 de l’acte de faillite, aurait rendu le dit paiement nul;

“Considérant que bien que la dite action soit intentée au nom du demandeur ès-qualité, il appert néanmoins qu’elle ne l’est que pour le bénéfice et avantage exclusif de John Stirling, John McCall et Joseph Shehyn, faisant affaires

en société sous la raison sociale de "Stirling, McCall & Co." et ce, sur autorisation du juge donnée aux dits "Stirling, McCall & Co." vu le refus du demandeur *es-qualité*, agissant sous l'autorisation des Inspecteurs à la dite faillite, de prendre lui-même la dite poursuite ;

"Considérant qu'en conséquence, aux termes de la section 68 de l'acte de faillite, les dits Stirling, McCall & Co. pourraient seuls et à l'exclusion de tous autres, prétendre à tout bénéfice et avantage pouvant résulter de l'annulation du paiement fait par le dit failli à la défenderesse comme susdit, si telle annulation était prononcée en la présente cause ;

"Considérant que la demande en nullité de paiement telle qu'exercée par la présente action n'est recevable que jusqu'à concurrence de l'intérêt certain et déterminé de la partie pour l'avantage de laquelle elle est faite ;

"Considérant que bien qu'il soit allégué par la dite action que les dits Stirling, McCall & Cie. sont créanciers du dit failli Rémi Champagne, le chiffre de leur créance n'est cependant mentionné ni établi nulle part dans la procédure ;

"Considérant en conséquence que la dite action n'allègue et ne démontre aucun intérêt appréciable et suffisant pour faire la base d'une condamnation quelconque ;

"Renvoie la dite action," &c.

In review, the above judgment was reversed for the following reasons :—

"Considering that there is error in the said judgment in dismissing the plaintiff's action for the reasons therein mentioned, and considering that the plaintiff *es-qualité* was and is entitled to judgment in his favor as in and by his said action is prayed, doth, revising said judgment, reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises ;

"Considering that the present action is brought by the plaintiff in his quality of assignee duly appointed under the provisions of the Insolvent Act of 1875 to the insolvent estate and effects of Rémi Champagne, of the parish of St. Philippe, in the district of Montreal, trader, to recover back a sum of \$320 and interest from the defendant, who is alleged to have been paid the same by the said insolvent in violation of 134th section of the said Insolvent Act of 1875 ;

"Considering that the said action, although

so brought by the said plaintiff *es-qualité*, is instituted for the benefit of Stirling, McCall & Company in the plaintiff's declaration mentioned, under an order of a judge issued under section 68 of the said Insolvent Act ;

"Considering that the interest of Stirling, McCall & Co. is not in issue, and that the said plaintiff in his said quality has authority under the said 68th section and under the said order of the judge to bring the said action in manner and form as the same has been brought ;

"Considering that the said payment was illegal, null and void and the defendants, at the time they took it, knew that the said Rémi Champagne was insolvent and admit as much in their pleas ;

"Considering that under the operation of the said Insolvent act and of the Judge's order permitting the assignee to sue in this case, the defendants have no other defence to the action than they would have had if all the creditors, instead of renouncing their rights in favor of the said Stirling, McCall & Co., had sued in the name of the assignee for their joint benefit ;

"Doth adjudge and condemn the defendants to pay and satisfy," &c.

In appeal, the judgment in revision was reversed, and the judgment of the Superior Court *en première instance* was restored, the reasons being recorded as follows :—

"Considering that the action is brought by plaintiff in his capacity of official assignee, for the benefit of Stirling, McCall & Co., and that in effect the said firm of Stirling, McCall & Co., is the real *dominus litis*, the name of the assignee being used in compliance with a formality of law ;

"Considering that the appellant received the sum of \$320 from the insolvent Champagne, on a conservatory process, to wit, by *capias*, and that there is no fraud in so receiving the said sum, but on the contrary that the said process was beneficial to the creditors of the said assignee ;

"And considering, therefore, that the said firm had no greater right or claim to the said sum than the said appellant ;

"Considering that the said firm has not proved the amount of its claim against the estate of the insolvent Champagne, and consequently has not shown any right to any par-

ticular part or share of the sum sought to be recovered, to wit \$320;

"And considering that there is error in the judgment rendered by the Superior Court sitting as a Court of Review at Montreal on the 9th of July, 1879;

"Doth reverse and annul the same, and proceeding to render the judgment which the said court ought to have rendered, doth confirm the judgment rendered by the Superior Court at Montreal on the 21st of December, 1878, and doth condemn the said respondent to pay to the appellants the costs as well in the Court of Review as in the Court here." (Dorlon, C. J. and Cross, J. dissenting.)

Judgment reversed.

Lacoste, Globensky & Bisailon, for Appellant.
Bethune & Bethune, for Respondent.

COURT OF REVIEW.

MONTREAL, March 31, 1881.

JOHNSON, RAINVILLE, PAPINEAU, JJ.

[From S.C., Montreal.

LEBOUX v. HUDON COTTON CO.

Damages—Negligence—Personal Injuries.

The appeal was from a judgment rendered by the Superior Court, Torrance, J., Jan. 31, 1881, condemning the defendants to pay \$500 damages.

The action was brought for the recovery of damages suffered by plaintiff, in consequence of an empty barrel, thrown from an upper window of the defendants' cotton factory, falling upon him. (See 4 Legal News, p. 46, for report of the case before the Superior Court.)

RAINVILLE, J., who rendered the judgment in Review, remarked that the defendants were clearly responsible under the circumstances of the case. As to the amount of damages awarded, the Court below had allowed \$500, which was only \$200 more than the defendants had tendered. In view of certain recent decisions of the Supreme Court it would not be prudent to disturb the award of the Judge *a quo*.

Judgment confirmed.

E. U. Piché, for plaintiff.

Beique & Co., for defendants.

COURT OF REVIEW.

MONTREAL, March 31, 1881.

JOHNSON, TORRANCE, JETTE, JJ.

[From S.C., Montreal.

DARLING *ex qual.* v. MCINTYRE *et al.*

Unpaid vendor—Right to take back goods sold and delivered to insolvent (but immediately returned by him) within thirty days before insolvency.

The plaintiff was the assignee of one James Hynes, and defendants were wholesale dry goods merchants at Montreal. The action was instituted under the Insolvent Act of 1875, ss. 132, 133, 134, 135, to recover goods alleged to have been delivered, transferred, and conveyed to defendants by James Hynes within thirty days before insolvency, and with a view of giving a fraudulent preference over his other creditors. Darling alleged the value of these goods to be \$523.31.

McIntyre & Co. pleaded that on or about the 15th March, 1880, James Hynes bought and ordered from defendants the goods mentioned and detailed on the first and second pages of plaintiff's account; that these goods were shipped by the Grand Trunk Railway Company to Hynes, at Prescott, on the 16th and 17th March, and arrived at Prescott on the 19th March; that Hynes refused to receive these goods, and returned them to defendant on the 20th March, and thereby the sale was cancelled; that defendants as the unpaid vendors had a right to have the sale cancelled and the goods returned to them, and that the consent of Hynes to this was not a fraudulent preference, inasmuch as he had never appropriated or taken possession of the goods; that as to the goods mentioned in the third page of the account (\$154.67), McIntyre & Co. admitted that these goods were sent on the 22nd March, 1880, and received by them; but they said the value was only \$97.65, and offered to confess judgment for so much, and asked that plaintiff's action be dismissed as to the surplus.

The proof established that the goods that were shipped on the 16th and 18th March arrived at Prescott on the 19th March, and that Hynes declared that he would not take delivery of them; that these goods were brought to Hynes' store without his knowledge, by one of the public carters of Prescott, who had carted for Hynes for years, and who was in the habit when any package was at the station for Hynes, to take them, whether he had been instructed to do so or not; that his clerks took them in and opened the packages, and took out the goods, but did not mix them with the other

goods, but kept them separate; that when Hynes found that the goods had been taken out of the cases he said he would not keep them, and refused to allow his clerks to mix them with his stock or to break in on the lots, but ordered them to be kept separate, and that they should be returned to McIntyre & Co. The goods were then put back into their cases, and the next day, 20th March, returned to the railway, addressed to McIntyre & Co., at Montreal, and were delivered to them on the 24th March. Hines was put into insolvency on the 17th March.

The judgment was in these words :—

“Considérant qu'aux termes de l'Article 1543 du Code Civil du Bas Canada, le vendeur non-payé a droit d'exercer l'action en résolution de vente ;

“Considérant que le dit James Hynes à qui les marchandises en question avaient été vendues, les a reçues dans son magasin, sans les débaler ni les développer ;

“Considérant qu'il est prouvé qu'il les a mises à part et ne les a pas exposées en vente, mais au contraire, a donné ordre à ses commis de ne pas les vendre ;

“Considérant que le dit James Hynes a renvoyé les dites marchandises aux dits défendeurs immédiatement après leur réception et que, par ce fait, la vente a été résolue d'un commun consentement, ce quo les parties avaient alors le droit de faire ; maintient le plaidoyer des défendeurs,” &c.

TORRANCE, J. The intention of the vendee to take possession is a material fact. *James v. Griffin*, 2 M. & W. 623. So in *Whitehead v. Anderson*, 9 M. & W. 529, Parke, B., said the question is *quo animo* the act is done. In the present case, the judge has found that the insolvent, whose clerks received the goods, did not accept them. On the contrary, being apprehensive of insolvency, he kept them separate and returned them to the vendor. The Court has held, on the facts stated by the witnesses before it, that the intention of the insolvent was against acceptance, and the construction put upon the acts of the insolvent by the Court was a most reasonable one, and entirely uncontradicted. As to the goods for which the defendants have confessed judgment, the only value put upon them is sixty-three cents in the dollar on the original cost. On the whole, the

conclusion of the Court here is that the judgment is correct.*

T. P. Butler for plaintiff.

L. N. Benjamin for defendants.

CIRCUIT COURT.

MONTREAL, March 21, 1881.

Before JETTE, J.

PATENAUDE et al. v. McCULLOCH.

Practice—Tax on filing pleas.

The defendant (in an action under \$25) moved for a rule against the Clerk of the Court, who refused to receive a plea to the merits without a stamp of 30 cents, although the defendant had already paid 30 cents on filing an *exception à la forme*.

Held, that in actions of \$60 and under, the tariff requires the payment of one fee only on the filing of pleas to the action, and where such fee has been paid on the filing of an *exception à la forme*, or other preliminary plea, no further fee is exigible on the pleas to the merits subsequently filed.—*Thibault v. Coderre*, 15 L.C.J. 330, followed.

Motion granted.

J. G. D'Amour, for defendant moving.

J. L. Archambault, for clerk of Court.

RECENT DECISIONS AT QUEBEC.

Superintendent of Public Instruction, Authority of—Mandamus.—La maison d'école de l'arrondissement No. 1 de la paroisse de St. Jean ile d'Orleans, étant devenu vieille et insuffisante, les commissaires décidèrent de la rebâtir au même endroit et passèrent, le 31 Janvier, 1877, une résolution à cet effet. Plus tard, ils adoptèrent une nouvelle résolution tendant à acheter le vieux presbytère pour y établir la maison d'école. Ces procédures furent désapprouvées par le surintendant, et le 23 Janvier, 1879, les commissaires adoptent une nouvelle résolution autorisant le président et le secrétaire à acheter une autre maison, ce qui fut fait.

Appel de cette procédure fut interjeté devant le surintendant, qui par sa sentence du 19 Mars, 1879, cassa la résolution du 23 Janvier, et ordonna la construction d'une maison d'école

* *Vide Benjamin on Sales*, 2nd Ed., p. 402-3, 708-9, 711; *Henderson v. Tremblay*, 21 L.C.J. 24; *In re Hatchette & Gooderham*, 21 L.C.J. 165.

sur l'ancien emplacement, etc. Les commissaires ayant refusé d'exécuter cette sentence, il fut émané un bref de mandamus.

Jugé (renversant le jugement de la cour inférieure): 1. Que le surintendant de l'instruction publique avait par la loi, le droit d'ordonner aux intimés de construire la maison d'école sur l'emplacement par lui désigné.

2. Que la réponse des commissaires (alors en possession du dit emplacement), qu'ils étaient dans l'impossibilité de se conformer à la dite sentence, parce qu'ils n'avaient pas de titres à cette propriété, etc., et qu'ils étaient exposés à être troublés par la fabrique, n'était pas admissible, et qu'ils n'avaient aucun intérêt à la soulever.—*Delisle & Les Commissaires d'école de St. Jean*, (Q.B.) 6 Q.L.R. 322.

Ship—Collision.—Where two vessels at sea, sailing, one on the starboard and the other on the port tack, came into collision, the latter was held to be in fault for not keeping out of the way, as directed by the 12th article of the sailing rules, which says: "When two sailing vessels are crossing so as to involve the risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side; except in the case in which the ship with the wind on the port side is close hauled and the other ship free, in which case the latter ship shall keep out of the way."—*The Princess Royal* (Vice-Admiralty Court), 6 Q.B. 342.

Usufruct—Movables.—*Jugé*, que l'usufruit et jouissance des meubles meublants, et des choses qui, sans se consommer de suite, se détériorent peu à peu par l'usage, détenus à titre d'usufruit, ne peuvent être saisis et vendus par les créanciers de l'usufruitier.—*Bertrand v. Pepin dit Lachance* (C.C.), jugement par Stuart, J.—6 Q.L.R. 352.

Married woman sued as widow.—*Jugé*, que quand une femme est poursuivie comme veuve, et que par exception à la forme, elle établit qu'avant l'institution de l'action elle était remariée, l'action doit être déboutée, et qu'une réponse spéciale alléguant "que la dette a été contractée par la défenderesse pendant son veuvage, qu'elle est séparée de biens avec son nouvel époux," sera déboutée sur une réplique en droit.—*Dynes v. Falardeau* (C.C.), jugement par Caron, J.—6 Q.L.R. 348.

Salary of public officer—Attachment.—In the case of an attachment of the salary of a public officer under the provisions of the Statute, 38 Vict. c. 12, there being no one upon whom an order binding as a judgment can be made, the Court will simply declare that the seizable part of defendant's salary, so long as he continues to be employed as a public officer, may be paid to the plaintiff until his debt be discharged. Meredith, C.J., said: "In ordinary cases it might be difficult to do anything beyond merely continuing the *saisie-arrêt*, because a judgment ordering a *tiers saisi* to pay to the seizing creditor would have the effect of transferring the debt seized, but that effect could not be produced under the present *saisie-arrêt*, there being no one upon whom an order binding as a judgment could be made. The Crown plainly could not be bound, and the *tiers saisi*, it is equally plain, cannot be bound, as he owes nothing personally. All that we can do, in a case such as the present, is to declare that, under the Statute, the seizable part of the salary of the defendant shall be payable in a particular way, whereas in ordinary cases a judgment such as that just mentioned, which in effect would be merely permissive, could hardly be rendered." In conclusion, the Chief Justice remarked: "I shall add merely that the Statute will probably require amendment, so as to provide for the case of several seizures of the same salary, in which case ruinous costs would be avoided, if the division of the seizable portion of the salary were (at least where there is no contestation) left to the head of the department from which the salary is payable; and as the continuance of the salary is altogether in the discretion of the Government, it does not seem to me that there could be any serious objection to the course proposed."—*Burke v. Colfer*, & Hon. E. T. Paquet, T.S. (S.C.) Opinion by Meredith, C.J.—6 Q.L.R. 349.

Right of action—Jurisdiction.—Poursuite prise à Québec sur un billet promissoire portant avoir été consenti à Québec, quoique de fait, il ait été signé à Ste. Luce, (Rimouski.) *Jugé*, que le défendeur en signant le billet et le transmettant de Ste. Luce à Québec aux demandeurs, a accepté la juridiction mentionnée sur le dit billet, et que l'action a originée à Québec.—*Thibault v. Danjou*, (S.C.), jugement par Caron, J.—6 Q.L.R. 351.

The Legal News.

VOL. IV.

APRIL 16, 1881.

No. 16.

EXPERTS IN HANDWRITING.

The *Albany Law Journal* notes the fact that the indictment against Philips and others, for forging and uttering the Morey letter, is to be quashed, the prosecution being satisfied that the defendants were not the authors of the letter, but were imposed upon by the real forger, yet four "experts" testified that Philips wrote the letter! Three of these persons are also witnesses in the *Whittaker* case—the colored cadet at West Point—and they all say that the cadet himself wrote the letter of warning which he alleges he received from an unknown hand. This may be so, but the evidence of these gentlemen will hardly make the proof more convincing. On the other hand, the defence have now introduced a Boston lawyer who swears, according to our contemporary, to several very bad blunders made by Mr. Southworth, one of the experts, in cases with which this witness had a professional connection; and that while Mr. Southworth is a man of veracity, he has become a monomaniac on the subject of handwriting, who "can see things about it that no one else can see, and can tell things about it that no one else can tell."

This Mr. Southworth is the same gentleman, we believe, that was so positive as to the address of the *Macdonald-Pope* letter being in the handwriting of Mr. Palmer, of the Montreal Post Office; nay, he is said to hold that opinion still, although the mystery has been fully cleared up by the acknowledgment of the real actor. So many blunders have been brought home to professional experts in handwriting that juries are justified in exhibiting a certain amount of distrust of their statements, however sincere and honest the witnesses may be.

RESTRAINT OF TRADE.

In a note by Mr. E. H. Bennett, in the *American Law Register*, to the English case of *Roussillon v. Roussillon*, (English Chancery Division), the author says:—

"In this case, more than in any other, ancient or modern, is distinctly brought out the

true ground upon which contracts in restraint of trade are declared void; viz., that under the particular circumstances of each case, and the nature of the particular contract involved in that case, the contract must be *unreasonable*. In determining that question of reasonableness or unreasonableness, the extent of territory covered by the prohibition is one element, and only one element, in arriving at the conclusion. Some cases seem to have made this a final and conclusive test, without any regard to the nature of the contract, or whether the public would or not suffer, or be likely to suffer, any inconvenience or detriment if the contract should be enforced. On the other hand, it seems more reasonable to consider the question of area only a subordinate and not a dominant consideration; and that while some contracts might be void, because unreasonable, if the territory covered by them were small, other contracts of an entirely different nature might be valid, even if a much larger area was included. It depends, or should depend, upon the nature of the business, and whether such business could be done throughout a large area by one occupying a central position therein; or whether such business must from its very nature be limited to a circumscribed locality. In the latter case a contract might be void when embracing a much smaller territory than in the former."

SUPREME COURT DECISIONS.

To the Editor of the Legal News:

DEAR SIR,—Although "R." kindly informed me through your columns, (4 vol. p. 97) that some "*critic, writer or pleader*" would soon be "*on the heels of the Reporter of the Supreme Court,*" I really did not expect that, before the judgments were published, my short notes would be so severely criticised. I may as well take this opportunity of informing your hypercritical readers that I do not pretend to give in these short notes, often prepared without the advantage of having all the judgments before me, a full digest of the case or an unassailable head note. All I was asked to do was to give in effect the result of the judgment in each case.

1st. "R." refers to the case of *Abrahams v. The Queen*. The judgment of the court in this case is very short, and if I have misled the profession, I can do no better than ask you to be

so kind as to publish the learned Chief Justice's judgment in this case, which is as follows :

"RITCHIE, C. J.—(After reading the reserved case) In acting under this statute the Attorney or Solicitor General or Judge, as the case may be, exercises what is in the nature of a judicial function, he is to judicially decide whether the indictment is proper to be presented to or found by the Grand Jury, so that, while on the one hand the rights of the public are to be guarded, individuals are to be protected from (as Cockburn C. J., in *Queen v. Bray* [3 B. & S. 258] says) "the abuse of the right of prosecution, by proceedings instituted either vexatiously or from corrupt or sinister motives;" and the duty of exercising this judicial discretion, when the prosecutor or other person presenting an indictment has not been bound by recognizance to prosecute or give evidence, or when the person accused has not been committed to or detained in custody, or has not been bound by recognizance to appear to answer an indictment to be preferred against him, is vested in the Attorney General or Solicitor General or Judge to be by them personally exercised; "the circumstances (as Cockburn, C.J., in the same case says) under which the direction shall be given, having been left entirely within the discretion of one or other of these officers; and with the exercise of which the Court will not interfere." *The Queen v. Heane*, [4 B. & S. 947] shows that where an indictment has been preferred without either of the three conditions mentioned having been performed, the matter may be brought before the Court on affidavit after plea pleaded, and the indictment may in the discretion of the court be quashed, or the party on a doubtful case be left to his writ of error.

"I think therefore that there being a special statutory power, it must be strictly pursued; the propriety of sending a bill before the Grand Jury having been confided to the judgment and discretion of the Attorney General, he cannot extend the provisions of the Act and delegate to the judgment and discretion of another the power which the Legislature has authorized him personally to exercise, no power of substitution having been conferred. In the present case it is admitted that the Attorney General gave no directions with reference to this indictment; that the gentlemen who put the indorsement on the indictment did do so merely because they were representing

the crown at the criminal term of the Queen's Bench in Montreal under a general authority to conduct the crown business at such term, but without any special authority over or any directions from the Attorney General in reference to this particular indictment. Under these circumstances the indictment in this case having been presented to and found by the Grand Jury without any compliance with the provisions of the statute, must be quashed."

2nd. In the case of *Shaw v. Mackenzie* "R." states: "There was no question as to the sufficiency or insufficiency of the affidavit. In the second place, no one pretended, that refusal to pay an over-due debt, accompanied by departure, was sufficient and probable cause that the debtor is leaving with intent to defraud his creditors."

In appellant's factum before the Supreme Court and on the argument it was contended:

"This affidavit is plainly insufficient to justify the issuing of a *capias*. By Art. 798 C. P. C. quoted above, Mackenzie should have specially stated in his affidavit his reasons for believing that Shaw's leaving Canada was with intent to defraud his creditors in general and the plaintiff in particular," and he should also have specially stated his reasons for believing that "such departure would deprive the plaintiff of his recourse against the defendant."

Then I find that the defendants by their plea contend:

"That the said Kenneth Mackenzie having given, in the said affidavit, the reasons which led him to swear that the said plaintiff was to leave immediately this Province with the intent to defraud his creditors, has complied with the requirements of the law, and unless it is proved in the cause in which said *capias* has been issued, that it is false that said Mackenzie has been so informed, such affidavit is sufficient to grant to said defendants a writ of *capias*."

On this Mr. Justice Cross, one of the dissenting Judges of the Court of Queen's Bench, says:

"The Art. 798 of the C. C. P. requires, among other things, that deponent should state in the affidavit that he has reason to believe, and verily believes, for reasons specially stated in the affidavit, that the defendant is about to leave immediately the Province of Canada with intent to defraud his creditors in general or the

plaintiff in particular. The leaving is, of itself, of little consequence, save as connected with the fraud: the reasons most material to be shewn are the reasons for belief in the intent to defraud, and, on reference to Mackenzie's affidavit, it will be found that these are wholly wanting, and the reasons there stated, only go to show that the defendant intended to leave, thereby allowing the assertion of intent to defraud wholly unsupported by special reasons.

"As I view the matter, the affidavit is insufficient in a material requirement; the deponent has not assumed the responsibility of swearing to particular reasons of intent to defraud, and on this point tenders no issue to be rebutted. Having failed to show sufficient reasons for the arrest, Shaw had no proof to make, and the burden was thrown upon Mackenzie, Powis & Co., to show a case for arrest, if this could be done outside of the affidavit, which affidavit had failed to do it. Had the affidavit contained these reasons, it would still have been the right of Shaw to have disproved them in this action, and it seems to me that he has proved an affirmative case sufficient to establish his good faith, even at the disadvantage of not being informed of the particulars he had to answer."

And on the 2nd point Mr. Justice Ramsay says in his judgment: "It is the first time I ever heard that it was an evidence of integrity to dispute the payment of an account that was due. It is frequently done by people otherwise respectable, but it is a *fraud*, nevertheless." And Mr. Justice Taschereau who delivered the judgment of the Supreme Court, in his reasons says:

"In fact, not only in this case, but also in their case against the appellant, and by the very terms of their own affidavit, upon which they arrested the appellant, it is clear and apparent that the respondents were and are under the impression that the fact alone of the departure of their debtor from the country was a sufficient ground to arrest him; and after reviewing the facts concludes by saying that "Shaw's arrest was entirely unjustifiable, and that it is clearly established in the present case that the respondents had no reasonable and probable cause for issuing the writ of *capias* in question."

Now by referring to my notes (4 Legal News, p. 89), it will be seen that I gave a short statement of the facts of the case, and as in the opinion of the Supreme Court there was, *at the time of the arrest*, "no misrepresentation, false excuse or precarious credit," and the only probable and reasonable cause Mr. Mackenzie had for believing that his debtor was leaving *with intent to defraud*, was the fact that Mr. Shaw had refused to make a settlement of an overdue debt and was about to depart for England, this was considered not to be a sufficient reasonable and probable cause.

3rd. As to the cases of *Desilets v. Gingras*, and *Reed v. Levi*, the counsel who argued the case, and some of the Judges who delivered judgments, relied on the decision of the Privy Council in the case of *Lambkin v. The South Eastern Railway Co.*, 5 App. Cas. 352, where it was held on appeal from a judgment of the Court of Queen's Bench, Province of Quebec, that "inasmuch as the damages awarded by the jury, were not of such an excessive character as to shew that the jury had been either influenced by improper motives or led into error, there ought to be a new trial." It may be that the motives of a Judge can never be said to be improper, and therefore it would perhaps have been better to say, as in the case of *Penn v. Bibby*, 15 L. T., N. S. 399, also relied on, to insert instead of "*influenced by improper motives*" the following, "*had acted on a wrong principle.*"

Reference is then made to some decisions of the Court of Queen's Bench, which have been reversed, and the cases not yet reported.

In *Bulmer v. Dufresne* the judgment of the court below was not reversed. *Chevallier v. Cu-villier*, was argued last term, and judgment has not yet been delivered.

Connolly v. Provincial Insurance Co. is in the hands of the printer. This leaves *Fuller v. Ames* and *Reeves v. Geriken*, which will be published if the Judges direct them to be published.

Now, Sir, as I have already stated, I do not hope to give your readers in advance *short notes* of cases, which cannot be improved on when preparing a full report, but I do hope that they will not be *all* and *altogether* defective.

Yours truly,

G. D.

NOTES OF CASES.

SUPREME COURT OF CANADA.

OTTAWA, March, 1881.

ALMON et al., Appellants, and LEWIS et al., Respondents.

Will—Annuities—Sale of Corpus to pay.

The bill in this case was filed by the executors and trustees under the will of John Robertson, deceased, to obtain the direction of the Court, as to the rights of the several persons interested under the will.

John Robertson died on the 3rd August, 1876, leaving a will dated 6th Aug. 1875, and a codicil, dated 21st July, 1876. By the will he devised to his widow an annuity of \$10,000 for her life, which he declared to be in lieu of her dower. This annuity the testator directed should be chargeable on his general estate. The testator then devised and bequeathed to the executors and trustees of his will certain real and personal property particularly described in five schedules marked respectively A, B, C, D and E, annexed to his will upon these trusts, viz:—Upon trust during the life of his wife, to collect and receive the rents, issues and profits thereof which should be, and be taken to form, a portion of his "general estate;" and then from and out of the general estate during the life of the testator's wife, the executors are to pay to each of his five daughters the clear yearly sum of \$1,600 by equal quarterly payments, free from the debts, contracts and engagements of their respective husbands." Next, resuming the statement of the trusts of the scheduled property specifically given, the testator provides, that from and after the death of his wife, the trustees are to collect and receive the rents, issues, dividends and profits of the lands, etc., mentioned in the said schedules, and to pay to his daughter Mary Allen Almon, the rents, etc., apportioned to her in schedule A; to his daughter Eliza, of those mentioned in schedule B; to his daughter Margaret, of those mentioned in schedule C; to his daughter Agnes, of those mentioned in schedule D; and to his daughter Laura, of those mentioned in schedule E; each of his said daughters being charged with the insurance, ground rents, rates and taxes, repairs and other expenses with or incidental to the management and upholding

of the property apportioned to her, and the same being from time to time deducted from such quarterly payments. The will then directed the executors to keep the properties insured against loss by fire, and in case of total loss, it should be optional with the parties to whom the property was apportioned by the schedules, either to direct the insurance money to be applied in rebuilding, or to lease the property. It then declared what was to be done with the share of each of his daughters in case of her death. In the residuary clause of the will there were the following words:—"The rest, residue and remainder of my said estate, both real and personal, and whatsoever and wheresoever situated, I give, devise and bequeath the same to my said executors and trustees, upon the trusts and for the interests and purposes following." He then gives out of the residue a legacy of \$4,000 to his brother Duncan Robertson, and the ultimate residue he directs to be equally divided among his children upon the same trusts with regard to his daughters, as are hereinbefore declared, with respect to the said estate in the said schedules mentioned.

The rents and profits of the whole estate left by the testator proved insufficient, after paying the annuity of \$10,000 to the widow and the rent of and taxes upon his house in London, to pay in full the several sums of \$1,600 a year to each of the daughters during the life of their mother, and the question raised on this appeal was whether the executors and trustees had power to sell or mortgage any part of the corpus or apply the funds of the corpus of the property to make up the deficiency.

Held, on appeal, that the annuities given to the appellants and the arrears of their annuities are chargeable on the *corpus* of the real and personal estate, subject to the right of the widow to have a sufficient sum set apart to provide for her annuity.

Weldon, Q.C., for the Misses Robertson.

Gilbert, for Mrs. Almon.

Kaye, Q.C., for Respondents.

COURT OF QUEEN'S BENCH.

MONTREAL, March 22, 1881.

DORION, C.J., MONK, CROSS, & BABY, JJ.

NOEL (petr. below), Appellant, and THE CORPO-

RATION OF THE COUNTY OF RICHMOND (respds. below), Respondents.

Temperance Act of 1864 preserved in force by the Confederation Act—Canada Temperance Act, 1878 (41 Vict., Cap. 16, sec. 3).

The appeal was from a judgment of the Superior Court at Sherbrooke (Doherty, J.), dismissing a petition on demurrer.

The petitioner, appellant, prayed for an injunction to order the respondent to desist from carrying out a by-law passed by the Corporation on the 14th March, 1877, under the authority of the Temperance Act of 1864, generally known as the Dunkin Act. The petitioner represented that he was a hotel-keeper and elector of the county, and that the effect of the by-law in question was to prevent him from continuing the sale of spirituous liquor. He urged that the Temperance Act of 1864 (under the authority of which the by-law was enacted) had ceased to have validity since the passing of the B. N. A. Act, inasmuch as by the latter Act power was given to the Dominion Parliament alone to regulate trade and commerce, and the Temperance Act of 1864 and the by-law in question were an infringement upon the trade and commerce of the country. He therefore sought to have the by-law set aside, and the Corporation enjoined from enforcing it.

The Corporation demurred to the action, assigning, amongst other grounds of demurrer, the following:

"Because at the time of the enactment of said by-law the respondents had full power and authority to enact the same, inasmuch as for that purpose the said 'The Temperance Act of 1864' was in full force and effect, and was specially continued in force and effect by the Confederation Act cited by the petitioner;

"Because the continuance in force and effect of the said 'The Temperance Act of 1864' has been fully approved and confirmed by the Legislature of the Dominion of Canada in and by the Temperance Act of 1878."

The demurrer was maintained, and on appeal it was

Held (confirming the judgment of the Court below), that the Temperance Act of 1864 was kept in force by the B. N. A. Act, section 129, which enacted: "Except as otherwise provided by this Act, all laws in force in Canada, Nova

Scotia, or New Brunswick at the Union, etc., "shall continue in Ontario, Quebec, Nova Scotia "and New Brunswick respectively, as if the "Union had not been made." Further, the Parliament of Canada, in passing the Temperance Act of 1878 (41 Vic. cap. 16), specially recognized the validity of the Temperance Act of 1864. (See sec. 3.)

Judgment confirmed.

L. C. Belanger for appellant.

Hall, White & Panneton for respondents.

COURT OF QUEEN'S BENCH.

MONTREAL, March 22, 1881.

DORION, C.J., MONK, CROSS & BABY, JJ.

BENNETT (petr. below), Appellant, and THE PHARMACEUTICAL ASSOCIATION OF THE PROVINCE OF QUEBEC (respds. below), Respondents.

Powers of Local Legislatures—Quebec Pharmacy Act, 34 Vict., Cap. 52.

Appeal from a judgment rendered by the Superior Court at Montreal, Rainville, J., Nov. 30, 1880, dismissing appellant's petition.

The object of the petition was to obtain a writ of injunction against the respondents, to prohibit them from prosecuting the petitioner, and also praying that the Act of the Quebec Legislature known as the Quebec Pharmacy Act of 1875, 34 Vict., cap. 52, be declared unconstitutional and *ultra vires*.

It appeared that the petitioner, who holds a license from the Ontario College of Pharmacy, for about a year had been carrying on the business of chemist and druggist in the city of Montreal. He had recently been prosecuted in the Police Court, under the Quebec Pharmacy Act of 1875, for using the title of chemist and druggist. He contended that the Act was *ultra vires* of the local legislature, being an interference with trade and commerce, a matter which falls exclusively within the jurisdiction of the Parliament of Canada.

In answer to this it was urged on behalf of the respondents, (1) that pharmacy is a branch of the medical profession; and (2) that the Pharmacy Act does not touch what may properly be called acts of trading, but merely prohibits certain things which are recognized as being the legitimate business of a pharmacist,

and debars certain persons, in the interest of society, from practising or holding themselves out as pharmacists. In thus legislating, the legislature has acted within its jurisdiction over the subject of civil rights.

These pretensions of the respondents were in substance maintained by the judgment of the Court below, which was in these words :—

"Considérant que l'acte d'incorporation de l'association pharmaceutique de la Province de Québec : 34 Vict. c. 52, et l'acte d'amendement de 1875 n'ont pas pour but de réglementer le trafic et le commerce, mais seulement d'exiger certaines connaissances des personnes qui voudront pratiquer la pharmacie ; que la pharmacie n'est qu'une branche de la médecine et tombe sous le contrôle de la législature de la province de Québec, et qu'en conséquence la dite requête et demande pour bref d'injonction est mal fondée, renvoie et rejette la dite requête avec dépens," &c.

On the appeal,

The Court held the judgment to be correct. Where power is entrusted to Parliament or to a local legislature for a certain purpose, and the exercise of that power by one legislature for the purpose contemplated by the law, trenches incidentally upon the powers assigned to the other legislature, the incident is included in the general power. Thus, in the case of *Cushing & Dupuy* (see 3 L.N. 171), the Privy Council said : "It is to be presumed, indeed it is a necessary implication, that the Imperial Statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them." Here the Pharmacy Act touched the subject of trade and commerce no further than was incidental and necessary to the exercise of general provincial powers, and the Act was therefore not *ultra vires*.

Judgment confirmed.

Robertson & Fleet for Appellant.

Kerr, Carter & McGibbon for Respondents.

COURT OF REVIEW.

MONTREAL, March 31, 1881.

JOHNSON, RAINVILLE, JETTÉ, JJ.

[From S.C. Montreal.

SLRETH v. HARBOR COMMISSIONERS OF MONTREAL.

Harbor Commissioners—Obstructions on the wharf.

The judgment inscribed for review was rendered by the Superior Court, Montreal, Torrance, J., Dec. 29, 1880, maintaining the plea to an action of revendication. See 4 Legal News, p. 2.

The Court of Review confirmed the judgment, (except as to \$3) holding that the defendants had a right to remove the obstruction in question, and to be repaid their disbursements.

McCorkill for plaintiff.

Abbott & Co. for defendants.

SUPERIOR COURT.

MONTREAL, March 31, 1881.

Before RAINVILLE, J.

HOWARD et al. v. YULE.

Testamentary Executor—Grounds of Removal—Dissipation of Estate—Loans without security—C.C. 917—Appointment of sequestrator.

The action was brought by certain of the legatees under the will of the late William Yule, asking for the removal of the defendant John Yule, sole surviving executor under the will, and for the appointment of a sequestrator to the estate.

The grounds of the action as well as the defence are fully set out in the written judgment of the Court, which is as follows :—

"La Cour, etc.

"Attendu que les demandeurs allèguent que feu Wm. Yule, par son testament exécuté devant témoins le 14 de mai 1842, et son codicile en date du 7 sept. 1843, a institué son fils le défendeur, et ses six filles ses légataires universels, et ses légataires particuliers pour certaine portion de sa succession ;

"Attendu que par les dits testament et codicile le défendeur a été institué exécuteur conjointement avec d'autres personnes aujourd'hui décédées ;

"Attendu que par les dispositions du dit testament les dits enfants ont droit aux intérêts des sommes qui leur sont respectivement léguées, et qu'après le paiement des dits intérêts, le surplus du capital, s'il y en a, leur revient à chacun d'eux en pleine propriété ;

"Attendu que par le même testament il est stipulé que si l'un des dits légataires meurt sans enfants, alors sa part accroît aux autres ;

"Attendu qu'il est, en outre, stipulé par le dit testament que chacun des dits co-héritiers aura

droit de disposer de la portion à lui léguée, par testament seulement, en faveur de l'un ou de plusieurs de ses enfants, selon qu'il le jugera à propos ;

" Attendu que par le dit codicile il est stipulé que chacune des dites filles du dit testateur, aura droit de disposer, par testament seulement, en faveur de son mari, pour sa vie durant, de telle partie de la portion à elle léguée qu'elle jugera à propos, mais qui ne devra pas excéder la moitié du revenu annuel qu'elle pourra retirer de la dite succession ;

" Attendu que le demandeur J. W. Howard est intéressé dans la présente cause en vertu du testament de sa femme feu Margaret C. Yule, l'une des dites légataires, exécuté le 21 d'août 1858, devant trois témoins, par lequel acte la dite Dame M. C. Yule a légué au dit J. W. Howard, son mari, les intérêts qui lui seraient dus et échus à la date de son décès, sur sa part de la dite succession, et aussi la vie durant de son dit mari, la moitié du revenu annuel qui pouvait lui revenir de la dite succession ;

" Attendu que les autres demandeurs sont les héritiers du dit feu Wm. Yule ;

" Attendu que les demandeurs allèguent que le défendeur n'a pas rempli ses devoirs comme tel exécuteur, savoir : 1o. qu'il n'a pas fait inventaire des biens de la dite succession ; 2o. qu'il a prêté des sommes d'argent considérables, savoir, au montant de \$22,422.35, sans aucune garantie quelconque, à des personnes qui étaient alors ou sont devenues depuis incapables de payer, sur lesquelles sommes aucun intérêt n'a été payé depuis plusieurs années, excepté sur la somme de \$5,400, et que le dit défendeur aussi lui-même a emprunté de la dite succession la somme de \$26,203.84, que ces faits constituent une dilapidation et dissipation des biens de la dite succession et indiquent, de la part du défendeur, une incapacité complète de remplir ses devoirs d'exécuteur ;

" Attendu que les demandeurs demandent en conséquence que le dit défendeur soit destitué de ses dites fonctions, et qu'un séquestre soit nommé pour prendre soin des dits biens ;

" Attendu que le défendeur plaide : 1o. quant au défaut d'inventaire, qu'il a pris possession des dits biens depuis plus de 40 ans, à la suite d'un inventaire fait par son dit père, quelque temps avant sa mort, et qui constatait que les biens de sa succession valaient £44,000, et que

les héritiers ne se sont jamais plaint de tel défaut ; et sur le second point, que les sommes qu'il a prêtées l'ont été à des héritiers futurs, et que les droits des demandeurs n'en sont nullement lésés ;

" Considérant qu'il est prouvé qu'en effet le dit feu Wm. Yule, quelque temps avant sa mort, avait fait un état des biens de sa succession, lequel état est produit et en constate les forces ;

" Considérant que les co-héritiers du défendeur ne se sont jamais plaint du défaut d'inventaire, et que le dit état doit valoir entre les parties et tenir lieu d'inventaire ;

" Considérant qu'il est prouvé que le dit défendeur a prêté ou avancé à deux de ses fils et à d'autres descendants des héritiers du dit feu Wm. Yule différentes sommes de deniers, se montant à plus de \$17,000, sur lesquelles des intérêts se sont accrus au montant de plus de \$9,000 ;

" Considérant que les dits prêts ont été faits sans aucune garantie, et qu'il est admis par le défendeur lui-même que l'un des dits emprunteurs est mort sans laisser aucuns biens, et que les autres sont sans moyens pécuniaires ;

" Considérant qu'aux termes du dit testament, si les dits emprunteurs venaient à mourir avant leurs auteurs, et si ces derniers venaient aussi à décéder sans descendants, les dits emprunteurs n'auraient jamais eu aucun droit à aucune partie des biens de la dite succession ;

" Considérant en outre que les dits entrepreneurs peuvent être deshérités par leurs auteurs, aux termes du même testament, que dans ce cas les sommes à eux prêtées se trouveraient complètement perdues ;

" Considérant que le défendeur a négligé de fournir régulièrement les intérêts sur les sommes par lui prêtées, savoir sur la somme de \$26,203.84 ;

" Considérant que dans le bilan fourni par le dit défendeur, une somme de \$939.29, au paiement de laquelle il avait été condamné envers M. C. Yule et autres par jugement de cette Cour, représentant leur part dans les intérêts accrus sur les dites sommes prêtées par le défendeur, apparaît à l'actif comme due par feu M. C. Yule, tandis que la dite M. C. Yule n'a reçu que ce qui lui était dû ;

" Considérant qu'il résulte de ces faits que le défendeur a mal administré les biens de la

dite succession, et qu'il est démontré qu'il est incapable de les administrer ;

"La Cour destitue le dit défendeur de ses dites fonctions d'exécuteur testamentaire et fidéi-commissaire de la succession de feu Wm. Yule, et ordonne qu'il soit nommé un séquestre pour prendre soin des biens de la dite succession, jusqu'à ce qu'un autre administrateur fidéi-commissaire soit nommé à la place du dit défendeur," etc.

Bethune & Bethune, for plaintiffs.

Ritchie & Ritchie, for defendant.

RECENT ENGLISH DECISIONS.

Master and Servant—Assault—Submission.—

Held, by the Court of Appeal, (affirming the judgment of the Court of Common Pleas, noted at p. 111) that the verdict was right. Bramwell, L.J., said: "I dare say the woman thought that her master and mistress had a right to have her examined. But what she did was to submit under the influence of other considerations. The truth is that it is impossible to say the jury was wrong in finding that she submitted, not in consideration of violence, but for some other reason. It is not like the case of a boy holding out his hand to be struck, for the boy knows that if he does not submit he will be compelled to submit to something worse." Baggallay, L.J., said: "I think the verdict was right. It appears that the girl voluntarily led the way up-stairs. She went into the room, and following out her statement, her objection was not so much to be examined as to strip off her clothes one by one. The doctor was in the performance of his ordinary duty. She might have resisted if she had pleased, but she did not resist." Brent, L.J., said: "I think there was no case to go to the jury against the doctor. I think he did not act in any way so as to make the girl think force would be used to her. She had so supposed, but without any such reason as would make a reasonable person think so, he would not be liable. It must be shown that he did use actual force, or that she acted under conduct of his which would make her think he was going to use violence. If there was no threat, and she submitted, there was no assault."—*Latter v. Braddell*.

Negligence, Evidence of—Railway Crossing.—

The defendant's railway crossed a level crossing which was some 20 yards distant from a foot-

bridge. Both the crossing and the bridge were private crossings. About 30 yards from the crossing a railway servant was stationed, who was sometimes shouted to by persons wishing to pass the level crossing with carts, and answered, "all right." The plaintiff, a boy of 11 years of age, having occasion to go over the line, was waiting at the level crossing until one train had passed, but was knocked down and severely injured when in the act of crossing it another train which he had not observed, and which was passing in the opposite direction. At the trial there was evidence that the bridge was dirty, and not lighted at the time of the accident; that the train did not whistle; that the plaintiff knew the bridge, having crossed it several times; and that the railway man used to bring out a stick to stop him from going over the bridge, but that when the accident happened he was not present. There was no evidence to show what the man's special duties were, or whether he had any duties in respect to foot passengers. *Held*, that there was evidence of negligence to go to the jury, and that the conduct of the railway man was a distinct breach of duty which amounted to negligence and contributed to the accident. *Clarke v. Midland Railway Co.* (Exchequer Division) 43 L. T. Rep (N.S.) 381.

GENERAL NOTES.

If there is one thing more than another that we have given our English friends credit for understanding thoroughly, it is the law of costs, yet now we find the *Solicitor's Journal*, of January 29, saying: "The law as to costs under the Judicature Act appears to be, with respect to certain questions, in a most lamentable state of doubt and confusion."

Under the present law in Illinois, the Appellate Courts are required to write opinions only in cases where the judgments of the Courts below are reversed. A bill is now pending in the House of Representatives which proposes to require the judges to write opinions in all cases. It is stated that, in fact, the judges have written opinion: in all affirmed cases involving important legal questions.

EXPERTS AT FAULT.—In Dr. Taylor's *Manual of Medical Jurisprudence* (of which an eighth American edition has just appeared), a case is referred to which occurred in April, 1843. At a town meeting in Salisbury, Conn., when the election was very close, a person proposing to vote was challenged by a physician, on the ground that he was a woman. Another physician stated to the meeting that he had examined the person, and found him a man. The individual then retired with the two physicians to a separate room, and both came to the conclusion that he was a man, and, upon their report, he was permitted to vote. And yet, a few days later, circumstances occurred which indicated pretty plainly that, after all, he was a woman.

The Legal News.

Vol. IV.

APRIL 23, 1881.

No. 17.

THE JUDICIAL APPOINTMENTS.

We expected that the appointments to the vacant judgeships would have been announced before this, but up to the time we write (April 21) there has been no official intimation. With respect to the Superior Court, it will probably be found inconvenient to postpone the appointment much longer. It is well known that one of the learned judges of this Court, having been compelled by ill-health to seek relaxation from duty, has been absent for several months. Mr. Justice Johnson has also been severely indisposed, and there is reason to fear that his illness must be ascribed to overwork. If six judges, with such outside assistance as was available, were unequal last year to the business of the Montreal Courts—and the legislature declared that to be the case—it is obvious that a force consisting of the four judges who have remained on duty during the last six weeks, must have been still less adequate.

It may be said without flattery to the bar, that the number of persons fairly competent for judicial positions is usually in excess of the vacancies to be filled: the appointing power, therefore, has the privilege as well as the responsibility of selection. If we had any act or part—either by way of suggestion or information—in the choice, we should not experience much difficulty on the present occasion. The name of one gentleman has been prominently mentioned in connection with the S. C. judgeship, and it is certainly unusual to find the qualifications necessary for the bench united in so remarkable a degree as in this instance: we need hardly say that we refer to Mr. Strachan Bethune, Q.C. Without derogating from the high position and solid attainments of other gentlemen who would adorn the judicial office, it may be said that Mr. Bethune, by right of seniority, as well as by the possession in a rare degree of the talent and experience which make a brilliant and useful judge, has a prior claim to the preferment. As a matter of fact he is the senior actively practising member of the Montreal section (Mr. Roy, the City

Attorney, excepted), and was already an advocate of high repute when the majority of the lawyers as well as some of the judges of this day were in the nursery, and during nearly forty years' practice he has been largely and continuously engaged in the most important causes, not only commercial but civil. Mr. Bethune would make an admirable member of the Court of Appeal, and we hope yet to see him there; but in the meantime his appointment to the Superior Court bench would be eminently satisfactory alike to the profession and to the whole community. The retirement of several judges is spoken of, and in due course there will be further vacancies which will be appropriately filled by the other gentlemen whose names have been mentioned in connection with judicial office; but, in the meantime, any other arrangement than that which we have suggested would simply have the effect of confirming the popular belief which so constantly finds expression in private conversation and in the public press, that governments in their judicial appointments are not always actuated by a pure and conscientious desire to secure the best talent, and to advance as far as in them lies the honor and dignity of the bench.

LAW COSTS.

It is worthy of note that many of the reforms which have been proposed in England from time to time are *faits accomplis* with us. One of the latest suggestions on the subject of law costs, by Mr. Justice Bramwell, is to the effect that solicitors should be paid a lump sum; for instance, so much if proceedings stopped at the writ, so much if they stopped at a further stage, so much if there was a trial; and this sum should vary according to the amount at stake and other circumstances. This might serve as a compendious statement of the principle on which our tariff has been constructed, and although Mr. Justice Bramwell has been ridiculed in some quarters for his proposition, he suggests a method which has been found convenient in practice in a province where suitors are not crushed by ruinous bills of costs.

THE BAR SECRETARYSHIP.

To the Editor of THE LEGAL NEWS:

DEAR SIR,—As a young English *confrère* is, I am told, going about among the profession

representing that I have retired from the candidacy for the Secretaryship of the Bar here, will you allow me space enough to say that I have been and still am awaiting the fulfilment of the promise made me two years ago by a large majority of the members of all classes, that as soon as the present incumbent should have received his due share of the honor, they would consider me next entitled to the position.

I remain, &c.,

C. H. STEPHENS.

Montreal, April 20.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, February 26, 1881.

DORION, C. J., MONK, RAMSAY, CROSS, BABY, JJ.
PAIGE et al. (defts. below), Appellants, and
EVANS es qual. (plff. below), Respondent.

Insolvent Act of 1875, Sect. 133—Sale in contemplation of insolvency.

Appeal from judgment of the Superior Court, Montreal, Torrance, J., March 29, 1879. See 2 Legal News, p. 150, for judgment of the Court below.

RAMSAY, J. If words have any meaning the defendant, B. P. Paige, must have contemplated insolvency as a necessary termination to his proceedings for nearly 15 years. It is not very easy to determine precisely the history of Mr. Paige's commercial life; but it is pretty plain that he had had considerable experience of insolvency. In the spring of 1849 he started in partnership with W. Robertson. That partnership lasted till 1854. Then alone, as B. P. Paige & Co., till 1857 or 8, when, according to one statement, H. D. Robertson became a partner. This seems to have come to an end after successful operations. By another account Paige continued his operations *alone* under the name of B. Paige & Co. until 1861, when he failed. The failure is unquestionable. We are next told he began business again in 1868 when he got his discharge. He had then "no capital scarcely." In 1870 he took in W. Stearns as partner. That partnership lasted a year. It was not prosperous. Then there was a sham firm of E. & B. P. Paige. E. Paige was brother of the defendant. This sham firm was dissolved by his brother's death, we are not told

when. He owed his brother money. He never took stock, kept no books and avowedly at the time of his insolvency had no idea of his financial position. Yet, he was paying from 14 to 20 per cent., in all about \$10,000 a year as interest, and the last year of his business his principal sales (sales of threshing machines) only produced about \$12,000. In face of this, in May, he suddenly bethought him of his debt to his daughter, and sold her a property somewhat under its value in May, and in July he gave an hypothec to his sister for \$1,500.

The only difficulty appears to me to be as to how far this affects the purchaser. Taking section 133 of the Insolvent Act, it seems that proof of the complicity of the creditor is not required. This is not in accordance with principle, but the terms of the law are express. There is, however, some evidence against her. In the first place she is the daughter of the insolvent, her condition was not such as to render it likely she should have savings to such an amount, a connection of the family says he knows no source from which she could have acquired so large a sum. This evidence might easily have been met, if she really had acquired this money, but she is perfectly silent. It seems to me it is sufficient to throw the burden of proof on her. I think, therefore, that whether we take Section 133 alone, or along with the evidence as it stands, the judgment of the Court below was correct.

Judgment confirmed.

R. J. Gibb, for Appellants.

Macmaster, Hall & Greenshields, for Respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, Dec. 21, 1880.

DORION, MONK, RAMSAY, CROSS, BABY, JJ.

MAHER (def. below), Appellant, and AYLMER (plff. below), Respondent.

Sale—Fraud—Collusion.

Appeal from judgment of the Superior Court, Montreal, Johnson, J., April 30, 1878. See 1 Legal News, p. 232, for judgment of the Court below.

On the appeal, the judgment of the Superior Court was unanimously confirmed, it being held that the sale effected by Henry Aylmer, jr., under his power of attorney, was fraudulent and

collusive, and in reality was made for the purpose of paying his own debts.

Judgment confirmed.

Brooks, Camirand & Hurd, for Appellant.

Ritchie & Ritchie, for Respondent.

SUPERIOR COURT.

MONTREAL, April 19, 1881.

Before TORRANCE, J.

TAVERNIER v. ROBERT et al.

Quebec Election Act—Action for Penalty—
Electoral List—Demurrer.

This was an action to recover from the Mayor and Secretary-Treasurer of the Municipality of the Parish of St. Joseph de Chambly, the sum of \$200 each, for alleged violation of the Quebec Election Act. The electoral list was in duplicate (section 12), and one duplicate was to be kept in the archives of the municipality, (section 38); the other duplicate should be transmitted to the registrar of the registration division in which was situated the municipality, within eight days following the day upon which such list should have come into force, by the Secretary-Treasurer, or by the Mayor, under a penalty of \$200, or of imprisonment of six months in default of payment, against each of them, in case of contravention of this provision. It was charged against the Mayor and Secretary-Treasurer, that in 1880, they had omitted to transmit to the registrar, within the eight days required, the duplicate in question, whereby the penalty of \$200 against each was incurred.

By section 39, if in place of the duplicate required by the preceding section, a certified copy of the list had been transmitted to the registrar, such copy should be deemed to be the duplicate required, and should have the same effect as if the duplicate itself had been transmitted.

The declaration did not allege any contravention of this clause.

The defendants demurred to the declaration *inter alia* on the ground that it did not follow that the defendants were liable to the penalty by non-transmission of the duplicate list, because they had the right of transmitting, with the same effect, the copy mentioned in section 39.

PER CURIAM.—The Court is with the defendants on this demurrer. It was incumbent

upon the plaintiff to show by his declaration not only that the duplicate referred to in section 38, had not been transmitted, but also that the copy mentioned in section 39 had not been transmitted. This has not been done by the declaration, and the demurrer should therefore be maintained for the seventh reason.

Demurrer maintained.

Lacoste, Globenaky & Bisailon for plaintiff.

Prevost & Prefontaine for defendants.

SUPERIOR COURT.

MONTREAL, April 20, 1881.

Before TORRANCE, J.

CLUB CANADIEN v. BEAUDRY et al., and SYMES et vir, opposants.

Succession—Seizure of immoveable of succession as the property of one of the heirs—Seizure held good for the share of said heir.

The opposants opposed the seizure and sale of land in this matter as the property of the defendant Marie Emma Alphonsine Beaudry. They set up that by a deed of obligation the late Joseph Ubalde Beaudry acknowledged himself to be indebted to opposants in the sum of \$5,000, and as security therefor specially hypothecated the land in question: that he died on 11th January, 1876, leaving as his heirs at law his five children issue of his marriage with Dame Marie Alphonsine Caroline Beaudry his wife; that said late Joseph Ubalde Beaudry was *commun en biens* with his said wife; that opposants obtained judgment against said Dame Beaudry and said five children for the recovery of the amount of said obligation on the 19th January last: that said defendants have been in possession as proprietors of said land ever since the death of said Joseph Ubalde Beaudry, and the said Marie Emma Alphonsine Beaudry of only a tenth thereof; that the seizure of said land as belonging to Marie Emma Alphonsine Beaudry alone was and is illegal, null and void, she being only owner of one tenth. The opposants concluded that the seizure be declared null.

Plaintiff declared that he admitted the opposition as to nine undivided tenths of the immoveable, by him seized on the defendant Dame Marie Emma Alphonsine Beaudry, and contested the opposition as to one undivided tenth of the land seized, and for contestation

in law said that the opposition was unfounded in law as to said undivided tenth. 1st. Because it appeared by the allegations of the opposition that the defendant Dame Marie Emma Alphonsine Beaudry, upon whom the seizure had been made, was then proprietor in possession of a tenth of the land: 2nd. because the conclusions of the opposition should only have demanded the nullity of the seizure for the part of the land not belonging to the defendant, and not for the totality.

PER CURIAM. This case is before the Court on a law hearing. The question simply is whether the seizure of the one undivided tenth of the defendant Dame Marie Emma Alphonsine Beaudry remains good, and whether the opposition should be declared unfounded in law as to this tenth. The Court is with the contestant on this question. The rule was so applied in the case of *La Société de Construction Métropolitaine v. Pitre dit Lajambe*, and *Félix Pitre dit Lajambe*, opposant, Nos. 486 and 1948, Superior Court, *Coram* Loranger, J., on the 31st March, 1879.

Demurrer maintained as to one tenth undivided share.

S. Bethune, Q.C., for opposants.

C. A. Geoffrion for contestant.

SUPERIOR COURT.

MONTREAL, Dec. 29, 1879.

Before JOHNSON, J.

Ex parte GAUTHIER, on writ of *Certiorari*.

Conviction—Punishment not sanctioned by law.

JOHNSON, J. The conviction in this case is technically bad. The plaint and summons were for an assault, and the defendant pleaded guilty, but the conviction shows a punishment of a kind not warranted by law, viz., a condemnation to pay the doctor's fee for sewing up the lip of the complainant. Whatever may be thought of the apparent reasonableness of such an exercise of jurisdiction, (and I confess to a certain reluctance in disturbing it), there is no authority in the law for it; nor, indeed, did any body appear to support it; but though the defendant will be relieved from illegal consequences under this conviction, I see he pleaded guilty, and I will give him no costs.

Conviction quashed.

Bourgoin & Co. for petitioner.

Geoffrion & Co. for Justices of the Peace.

SUPERIOR COURT.

MONTREAL, December 29, 1879.

Before JOHNSON, J.

De MONTIGNY *v.* THE WATERTOWN AGRICULTURAL INSURANCE CO.

Admission by plea without deposit—Costs of Contestation.

JOHNSON, J. The plaintiff insured originally with another Company; and the present defendants assumed the risk. The amount of loss asked for by the action is \$1,173, though the actual loss suffered is alleged to have been greater; and the subjects of insurance were two barns designated as barn No. 4 and barn No. 5, and their contents.

The defendants met the action by four pleas. 1st, a plea of over valuation, which is waived: and then two other pleas which it is admitted are not established by evidence; and, fourthly, by a plea (the only one now remaining) to the effect that the 12th condition of the policy stipulated a reference to arbitration, to determine finally the amount of any loss about which the parties might differ, and the plea goes on to say that this arbitration has taken place, and a final award has been made, and they offer the amount of it, that is, they offered it with the costs of the action, before contestation; but they do not make any consignment, so that this is only an admission and nothing more. But it is an admission that the plaintiff is entitled to judgment for that amount, and if the latter contests the case afterwards, he must pay costs if he fails in his contestation.

In my opinion the plaintiff has failed in contesting the amount thus admitted, and has not established anything beyond it. Besides the stipulation in the policy, there was a subsequent agreement after the fire to submit the amount of loss to arbitration to two persons, who were to call in a third in case they differed. All this has been done, and there is judgment for the amount admitted in the plea, i.e., for the sum of \$846.10, which includes the costs up to filing of plea; and the plaintiff must bear the costs of contestation after that.

Trudel & Co. for plaintiff.

Davidson, Monk & Cross for defendants.

SUPERIOR COURT.

MONTREAL, Nov. 29, 1879.

Before JOHNSON, J.

ROBILLARD v. SOCIÉTÉ CANADIENNE FRANÇAISE DE
CONSTRUCTION DE MONTREAL.*Building Society—By-Law irregularly enacted.*

JOHNSON, J. The plaintiff acquired shares in the Society on the 20th Aug. 1877, from one Lonergan in whose rights he now stands; and he brings his action alleging his right to retire from the Society and to get back the payments already made. This right he assumes to exercise under By-Law No. 13 of the Society.

The defendants answer: 1st, that the plaintiff is a mere *prête-nom*; but that has been already disposed of.* 2ndly. They set up a repeal of By-Law No. 13, by another which was made on the 14th February, 1871, and which substituted other provisions for it; and 3rdly, they plead compensation to the extent of \$50.16, even if the by-law No. 13 should be held to be in force.

The plaintiff makes reply that there has been no effective repeal of the by-law under which he brings his action, the provisions of the Statute in that behalf having been disregarded, and the meeting of the 14th Feb., 1871, not having been a general meeting nor convened in the manner required by Sec. 7 of the Statute. He further says that the defendants had no power, under the law regulating these societies, to restrain the right of members to retire when they pleased—a right distinctly recognized by the 1st Section of the Act, Sub-section 4. Then, as to the compensation, he says it is unfounded in point of fact, and is, moreover, an admission of their debt to him.

This case, as regards the essential points of it, has been virtually decided by the case of *Prevost* against the *Société Canadienne Française de Construction de Montréal*,† in which pretensions precisely similar on one side and on the other were raised, and the plaintiff got judgment during this present month in this Court. Adhering, however, to the original article, the plaintiff must pay what he owes under it, and which is stated by the witness Lapalme to be \$48. Therefore, he is only entitled to

judgment for the balance, which is \$261.50, and interest from service, and costs.

R. & L. Laflamme, for plaintiff.

M. E. Charpentier, for defendants.

SUPERIOR COURT.

MONTREAL, March 31, 1880.

Before JOHNSON, J.

BANQUE DU PEUPLE v. VIAU.

Promissory Note—Payment to Endorser.

JOHNSON, J. The action is against the maker of a promissory note drawn payable to the order of Campbell Bryson at the Banque du Peuple. The defendant's plea is that he sent the money to Bryson before the note became due, to take it up; and that after the making of this note he gave Bryson other notes in the course of their dealings, and always sent him the money in the same manner, and they were always retired; that when the present note fell due there was money enough at Bryson's credit in the Bank to pay it; and it was actually paid, though Bryson neglected to withdraw it. Bryson subsequently made an assignment, and the Bank ranked on his estate for other notes.

There is no doubt that the money was sent by the defendant to Bryson; but that would be no defence as against the Bank. Beyond that one fact, and the fact that Bryson paid other notes afterwards, the defendant has proved nothing. Certainly there is nothing proved in the nature of a payment, or that can possibly be considered a payment to the Bank. The latter may have had funds of Bryson's; but not as far as they could know, of Viau's.

There was something said of \$4.46 having been received on account; but I see no proof of it, and no *retrazit*; but the plaintiff can credit the defendant with that if he has received it. Judgment for plaintiff.

Geoffrion & Co., for plaintiff.

St. Pierre & Scallon, for defendant.

COURT OF REVIEW.

MONTREAL, Dec. 29, 1879.

JOHNSON, RAINVILLE, LAFRANÇOIS, JJ.

GORDON v. McDONALD.

Partnership—Joint and Several Liability.

JOHNSON, J. The plaintiff brought his action to recover the value of the hire of some cars used

* See 2 L. N. 181.

† See 2 L. N. 412.

in constructing a railway. The plea was a general denegation. The defendant was condemned to pay only a part of the amount demanded; but he inscribes the judgment for review upon the evidence, and he contends in his factum, and contended at the argument, that the hire having been made to the firm of Abbott & McDonald, there should be proof that he assumed the obligations of the firm: but the members of the firm, of which Mr. McDonald admits he was one up to July, 1875, do not cease to be individually liable jointly and severally; and as to the amount adjudged, it was said with some plausibility by the plaintiff that it ought to have been larger; but there is no inscription on his part, and the judgment is therefore simply confirmed.

Trenholme & Co. for plaintiff.
Loranger & Co. for defendant.

SUPERIOR COURT, QUEBEC.

Taxes—Demand of Payment—Jurisdiction.—*Jugé*, que la demande de paiement pour taxes (en vertu de l'article 661 du code municipal) adressée à une femme séparée de biens, et à elle transmise dans une enveloppe à l'adresse du mari, est suffisante.

Que la Cour de Circuit a juridiction dans ces causes, quelqu'en soit le montant.—*La Corporation du Village de Bienville v. Gillespie et vir* (C.C.), jugement par Casault, J.—6 Q.L.R. 346.

SUPERIOR COURT, MONTREAL.

Pawnbroking—Penalty.—1. An isolated act of pawning will not constitute the exercise of the trade of a pawnbroker, within the meaning of the Quebec Statute, 34 Vict. Ch. 2, S. 69,—*Perkins v. Martin*, 25 L. C. J. 36.

2. Payment of a penalty under said Act, in a *qui tam* action brought for its recovery, by depositing the amount with the Clerk of the Court in which the judgment was rendered, will, in the absence of proof of collusion, be an absolute bar in a subsequent action by the Revenue Officer for the recovery of the same penalty.—*Id.*

3. In the absence of proof that the affidavit required by 27 and 28 Vict. Cap. 34, Sec. 1, has not been filed, such affidavit will be presumed to have been filed, when the writ has actually

issued and judgment has been rendered thereon.—*Id.*

Negligence—Excavation in street.—A proprietor of real estate in Montreal is responsible for an accident arising from the neglect to cover and put a railing round an excavation in the public street, connected with the making of a drain from his property to the public drain, and to put up a light at the spot, when the permit to make such excavation has been granted to him by the Corporation on condition of his making such covering and railing, and putting up such light, notwithstanding that such excavation was made by a contractor over whom the proprietor had no control.—*McRobie v. Shuter et al.*, 25 L. C. J. 103.

SUPERIOR COURT, TERREBONNE.

Procedure—Execution.—Le défaut de *fiat* pour l'émanation d'un bref d'exécution n'est pas une cause de nullité du bref lui-même quant aux parties demanderesse et défenderesse.—*De Bellefeuille v. Pollock*, 25 L. C. J., 104.

2. Le fait qu'un bref d'exécution contre les meubles a été émané sur un *fiat* ne contenant pas le jour du rapport, et que le registre des exécutions tenu par le protonotaire mentionnait un jour de retour différant de celui entré dans l'exécution, constitue tout au plus une nullité sans griefs que le défendeur n'a pas d'intérêt à invoquer.—*Id.*

COURT OF APPEAL, ONTARIO.

Insolvent Act of 1875—Recovery of debts under Sect. 68.—Where certain creditors of the insolvent take proceedings under Sect. 68 of the Insolvent Act, 1875, in the name of the assignee, to recover a debt due the insolvent, they are entitled to the amount recovered, and the estate cannot benefit by the recovery in any way unless indirectly, when the creditors' claims are extinguished thereby, and consequently their right to receive further dividends from the estate is gone.

Where in such a case the debt was paid to the assignee, who refused to pay it to the creditors who had taken the proceedings to recover it: *Held*, that their proper remedy was by application to the Judge of the Insolvent Court.—*In re Lewis*, insolvent, (March 23, 1881), 17 C. L. J. 166.

NUISANCES FROM NOISES.

It is often a matter of interest to know how far noises must be endured before there is a possibility of legal redress. A few years ago, a Mr. James Redding Ware, a literary gentleman, occupying chambers in Lincoln's-Inn-fields, applied for an injunction against a Mr. Corpe, to restrain the defendant from doing an act which was alleged to be a nuisance. The plaintiff, it appears, occupied chambers on the third floor, on which he had expended a considerable sum of money, having taken them in a dilapidated condition. The defendant, who occupied chambers on the second floor directly under those of the plaintiff, bought last summer an organ, which was forthwith conveyed to his premises. The approximate dimensions of the said organ, which occupied half of the room, were stated to be 12ft. high, 10ft. wide, and 4ft. or 5ft. deep. The plaintiff, not unnaturally, protested strongly against the introduction of such an instrument into such a place, but to no purpose; the reply was, it would make less noise than a piano, and that no nuisance to anybody would be caused by the playing. We will quote the plaintiff's own words as to the reasons on which he based his application for relief: "The organ," he said, "had been played at different periods since (*i. e.*) last summer, about two or three times a week; he stayed in once for about three hours, during which it was being played, and found that it so interfered with his comfort and the performance of his work that whenever it commenced he had to leave the house. It was usually played from seven o'clock until ten o'clock in the evening, and the vibration was very great, causing an effect very like that produced by a single application of galvanism. On the first day it was played, a Dresden plate in his room was thrown down; the vibration communicated itself to all the articles in his room, composed of china, glass, or metal.* * * The music was very bad, and very common airs were played." The evidence given by the plaintiff was corroborated by other gentlemen who occupied other adjoining chambers, one of whom stated that he was quite incapacitated from doing his work in his sitting-room, where his books and papers were, during the time that the organ was being played. Some contradictory testimony was given on the other side, with the view of showing that no such nuisance as was

alleged by the plaintiff did in fact exist. The County Court judge, however, considered the nuisance an "intolerable one," but gave judgment in favor of the defendant, on the ground that it was not such a nuisance as formed the subject matter of an action.

On the above case, the *Law Times* remarked:

"Nuisance," says Blackstone, "is anything that worketh hurt, inconvenience, or damage," but many acts which may properly come under the above definition would not be the subject of an action. In other words, there are nuisances and legal nuisances. The principle upon which the rule of law proceeds is, "*sic utere tuo ut alienum non laedas*." But it must not be inferred that an action can be maintained for a thing done merely to the inconvenience of another—mere inconvenience or annoyance does not always constitute a legal nuisance. If the authorities on the subject come to be examined, the real test, we apprehend, is this: Is the act complained of such as a man might reasonably commit in the exercise of his rights, having regard to all the circumstances of the case? Or, to use the words of Vice-Chancellor Bruce, *Walter v. Selfe*, 4 DeGuz and Sm., 315: "Will the proceedings abridge and diminish seriously the ordinary comforts of existence of the occupiers, whatever their rank or station, or whatever their state of health may be?" See also, *Crump v. Lambert*, L. Rep., 3 Eq., 409. If so, the nuisance is actionable. A reasonable use of a man's property ought in right to be permitted: but if a person puts his premises to unusual purposes, so as to cause his neighbor a substantial injury, the latter is entitled to be protected, because that is not a reasonable use of his property. See the remarks of Lord Selborne, when Lord Chancellor, in *Ball v. Ray*, L. Rep., 8 Ch. App. A man's occupation of his house may be rendered materially uncomfortable, and yet the act complained of, *e. g.*, the noise of a neighbor's children in a nursery, may not be a subject of redress; because, as Lord Justice Mellish said, in *Ball v. Ray*, "the noise is such as he must reasonably expect." Acting on this principle, Vice-Chancellor Bacon decided, in *Harrison v. Good*, 40 L. J., 294 Ch., that the establishment of a national school, however much it might injure and depreciate the adjoining neighborhood, was not an actionable nuisance. The mere fact of the deprecia-

tion of the adjoining property could not establish a nuisance, for, as the Vice-Chancellor truly observed, "in common parlance, nuisance is no doubt applied to a great many things wholly different from, and others not at all like, the definition which by law is given to the word." Cases of nuisances from offensive smells, and the exercise of noisome trades, have always been determined on similar considerations, and the question has always been whether the business or trade which causes the annoyance is carried on in a reasonable manner, and in a reasonable and proper place. There is a reported case tried before Lord Kenyon, *Street v. Tugwell*, Selw. N. P., 13th ed., 1070, which may seem to conflict with these remarks, but does not really do so. There an action was brought against the defendant for keeping dogs so near the plaintiff's dwelling house that he was disturbed in the enjoyment thereof. It appeared that the defendant kept six or seven pointers so near the plaintiff's dwelling-house that his family were disturbed during the night, and were very much disturbed in the day-time. No evidence was given by the defendant, notwithstanding which the jury found a verdict for him, and a new trial was afterward refused. It should be borne in mind, however, that the question of reasonableness is for the jury, and the court would doubtless have upheld the verdict had it been found the other way.

Now, applying the legal test to the case heard at the Westminster County Court, did the defendant, under the circumstances, exercise a reasonable user of his chambers in erecting an organ of the dimensions we have mentioned? There can, we think, be no doubt how this inquiry should be answered; indeed, the learned County Court Judge has found as a fact that the act complained of is an intolerable nuisance, though he has, notwithstanding this, held such an act not to be an actionable one.

RECENT CRIMINAL DECISIONS.

Insanity as a defence.—Evidence as to sleeplessness and nervous restlessness is admissible to prove insanity. Insanity is a complete answer to a criminal charge. To justify the inference of insanity from calmness of manner and indifference to consequences accompanying the killing, there should be convincing evidence of previous insanity, or insane delusion,

so recent as, coupled with the causelessness of the killing, to raise the presumption that the paroxysm had not entirely passed away. Moral insanity, consisting of irresistible impulse co-existing with mental sanity, is no defence to a criminal charge. Insanity is a defence which must be proved to the satisfaction of the jury, by the measure of proof required in civil cases; and a reasonable doubt of sanity raised by all the evidence does not authorize an acquittal.—*Brasswell v. The State*, Supreme Court, Alabama, January, 1881.

Libel.—It is no defence to an indictment against the editor of a newspaper, that the libellous article was written and inserted by the local editor without the knowledge of defendant, and in violation of a general order forbidding the publication of any article of a libellous nature without first submitting it to the publisher for approval.—*The Commonwealth v. Willard*, Supreme Court, Pennsylvania. The Court said: "Aside from the incalculable damage that may and often does result to the innocent from a misuse of the press in the hands of reckless or malicious persons, and the consequent caution proper to be exacted from those managing newspapers as to the selection of the subordinates in whose hands they intrust this dangerous power, there is the peculiarity incident to the profession of a publisher that the publication of a journal, or a magazine, or a book, is not the visible, manual act of the publisher himself, but is made up of the labors of many different persons, in no one portion of which he may have an actual part. He may not be present at or witness any single one of the various processes of work by which the completed book or newspaper is finally produced; he may not even see it when done, and yet the publication is his act. This is in part, no doubt, the reason why the law of libel forms an apparent exception to the usual rule, that one can only be liable criminally for his own individual acts. That such is the law, whatever may be the reason for it, there would seem to be no question. It was established by a long line of cases in England, decided by such judges as Hale, Mansfield, Raymond, Kenyon, Powell, Foster, Ellenborough and Tenterden, and which will be found fully stated in a note in Starkie on Slander, 1st Am. Ed., vol. 2, p. p. 30-34.

The Legal News.

VOL. IV. APRIL 30, 1881. No. 18.

SUPREME COURT DECISIONS.

Mr. Duval is over-sensitive. No one ever said that some critic would be "on the heels of the reporter of the Supreme Court." Mr. Duval has misquoted our words and misunderstood the remark to which he refers—which is really of little or no importance. Nor was the correctness of his notes called in question; but we said they were an unsatisfactory substitute for the full reports of the decisions of the Supreme Court, for the preparation and publication of which a considerable sum of public money is annually expended. We now learn from Mr. Duval that the reason why two cases, in which the judgments of the Court of Queen's Bench were reversed, have not been reported is, that the judges have not authorized the reports. One of these cases was not unimportant, for what purported to be the opinion in MS. of one of the judges was flaunted in the face of the Court of Queen's Bench in a subsequent case, without, however, producing any marked effect. It might have been otherwise had the judicial argument been fortified by the approbation of the Court.

Mr. Duval's letter has some further significance as being the semi-official defence of the Supreme Court judgments in the cases of *Shaw v. Mackenzie*, *Reg. v. Abrahams*, *Levi v. Reed*, and *Gingras v. Desilets*.

We are told that the two last cases were decided on the authority of the decision of the Privy Council in the case of *Lambkin v. The Eastern Counties Railway*. This is confirmatory of what we said in the previous article. *Lambkin's* case was decided by a jury, *Levi v. Reed*, and *Gingras v. Desilets* by a judge. In applying the principles of *Lambkin's* case to the two others, the judges of the Supreme Court appear to have jumbled up two systems essentially different. To some people it may appear a hypercritical difference, but we think the bar would find it convenient to know precisely whether the Supreme Court has laid it down as a rule that the Court of Appeal can only touch

the decision of the court below on matter of fact, for reasons similar to those on which the verdict of a jury can be set aside. It is the more important this decision should be made as public as possible, for it is at variance with the general principles of jurisprudence, and with the positive law of this province.

It is unnecessary in the *Abrahams* case to go over the ground already fully discussed, as to whether the Attorney-General can delegate his powers to direct that a bill, in certain cases, should be laid before the Grand Jury. Chief Justice Ritchie's *dictum*, that a statutory power must be strictly pursued, adds nothing to the controversy, and the introduction of the word "special" before statutory does not complicate the question. The question is, what is pursuing the terms of the statute, and the decision turns entirely on whether the power conferred is judicial or not. But when the Chief Justice tells us in so many words, that "it is admitted that the Attorney-General gave no directions with reference to this indictment," we must say that the Chief Justice has had peculiar facilities accorded to him which others had not, and the record says exactly the reverse. The direction was as follows:—"I direct that this indictment be laid before the Grand Jury. L. O. Loranger, Attorney-General; By J. A. Mousseau, Q. C.; C. P. Davidson, Q. C., 24 L. C. J., p. 327. Next, the question reserved is in these words: "Whether the Attorney-General could delegate his authority to direct that the indictment be laid before the Grand Jury, and whether the direction, as given on the indictment was sufficient to authorize the Grand Jury to enquire into the charges and report a true bill." 4 Legal News, p. 42, and 24 L. C. J., p. 327.

The fourth and last case to which we referred was that of *Shaw v. Mackenzie*. Our previous observations have drawn forth an excerpt from the opinion of Mr. Justice Taschereau, "who delivered the judgment of the Supreme Court." This is textual and consequently valuable, as it may be considered the pith of the reasons of the Court. From this we learn that this august tribunal is of opinion that because an affidavit to hold to bail is insufficient, and because the plaintiff was under a wrong impression as to what was a sufficient cause of arrest, therefore the plaintiff is liable

in damages, no matter whether he proves abundant other ground for that sort of suspicion which in legal phraseology is styled "probable cause."

We have been drawn into a fuller discussion of the merits of these cases than was at first intended, or than is suitable for this journal. The object of our allusion to them was only to show how necessary it is that faithful reports of the sayings and doings of this all-powerful Court might be within the reach of others than the small audience congregated in a back room of a small town, which might be fairly called obscure, if it were not the metropolis of the Dominion. It would seem that a new, and, in principle, defectively constructed Court, which has just escaped a condemnatory vote of the House of Commons by prudent tactics, would be only too anxious to show to the world that they did not deserve the condemnation. They should remember that it cannot be hoped that their judgments will be, as a whole, better than the Courts of appeal in each province; they should, therefore, take care that there is a record to show that they are not worse. Again, as the sole object of the existence of the Court is to keep up a certain uniformity in the jurisprudence of the country, it is absolutely necessary we should know what that jurisprudence is.

R.

APPOINTMENTS.

Since our last issue two important appointments have been officially made known. The newly created sixth judgeship of the Court of Queen's Bench of this Province has been filled by the nomination thereto of Mr. Justice Baby who has been acting as a judge of the Court during the absence of Mr. Justice Tessier. The latter, we are glad to learn, has returned from Europe with restored health, and will resume his duties forthwith. The Hon. Chancellor Spragge has been appointed Chief Justice of Ontario, in the room of the late Chief Justice Moss.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, April 28, 1881.

Before TORRANCE, J.

In re **SEYBOLD**, insolvent, **EVANS**, claimant, and **SEYBOLD**, contestant.

Insolvent Act of 1875, Sec. 71—Lease to Insolvent—Notice required to terminate.

The lessor of premises occupied by the insolvent claimed under a lease \$2,000 for rent, and \$240 for assessments, for the year ending April 30, 1880.

The insolvent contested the claim, alleging that the lease had terminated on the 30th April, 1879, by a notice from the assignee on the 31st January, 1879, and by a resolution of the creditors on the 7th Feb., 1879.

PERRIER. The notice by the assignee is proved by himself and was unauthorized by the creditors. It ought to have been in writing and authorized; *Agnel*, Code des Propriétaires, n. 885; and, moreover, the creditors were only authorized to terminate the lease, at least three months before the time fixed. *Insolvent Act*, 1875, Sec. 71, says their meeting must be held more than three months before the termination of the yearly term. The contestation is overruled.

D. Macmaster for claimant.

H. Abbott for contestant.

SUPERIOR COURT.

MONTREAL, April 28, 1881.

Before TORRANCE, J.

LAMBE v. HARTLAUB et al.

Unpaid Vendor—Rescission of Sale—Compliance with terms of contract—"Duty paid"—Error of Customs Authorities.

This was an action to rescind a sale of 473 half chests of tea, under C. C. 1543.

The sale had been made by the vendor **Lambe**, at Toronto, on the 5th February, 1880, through a broker at Montreal, at 32½ cents per lb., duty paid, delivered in Toronto; terms, prompt cash. **Lambe** alleged fulfilment of his contract, the receipt of the goods by **Hartlaub & Co.** at Montreal, and their neglect to pay the price.

The action began with an attachment of the goods in July, 1880.

The defendants pleaded that the teas were sold duty paid, and that the duty was not paid, and in consequence they were seized on arrival in Montreal by the Customs authorities, and the seizure was only discharged on the 6th April, 1880; that meanwhile they had sold the teas to **John Osborne, Son & Co.**, and being unable

to deliver the teas by the breach of contract of Lambe, they lost profits on their sale, and were liable in damages to their own vendee for non-delivery to him, in all \$835.24; and they claimed that in the event of the teas being delivered to plaintiff they should be subject to the lien of Hartlaub & Co. for \$835.24.

PER CURIAM. The facts of the case show a sale by Lambe to Hartlaub & Co. on the 5th February, 1880, duty paid—teas delivered in Toronto. They were shipped to Hartlaub & Co. by the Grand Trunk Railway Company, duty paid, but on their arrival here were immediately seized by the Customs, as having been fraudulently entered as coming direct from Japan, in which case the duty payable was 10 per centum *ad valorem*, whereas, if imported indirectly the duty was 20 per centum.

After some negotiations with the Government the teas in question were liberated, and it is proved that they were not fraudulently entered at the Customs. There is no proof of any default on the part of Lambe, and he cannot be held responsible for what was an inevitable accident. If the Customs authorities were to blame in the seizure, Hartlaub & Co. have their recourse against them, and not against Lambe who sold and delivered the teas according to contract at Toronto.

Judgment for plaintiff.

D. Macmaster for plaintiff.

W. W. Robertson for defendants.

SUPERIOR COURT.

MONTREAL, April 28, 1881.

Before TORRANCE, J.

THOMPSON et al. v. CURRIE et al.

Contract—Time of performance—Goods to be delivered "shortly"—Three months after not a reasonable time.

The action was for specific performance of a contract of sale of iron pipe, through a broker, made on the 2nd February, 1880, by plaintiffs to defendants. A portion of the iron was in store, and deliverable from there. The balance was to arrive shortly, and to be delivered by the Grand Trunk Railway Company. The portion in store was delivered and paid for, and about the 29th March about 30,000 feet of the

remaining lot were delivered and paid for, and on the 11th May, of the remainder about 15,000 feet which were on board the steamer *Polyne-sian*, were tendered and refused. There was no evidence of the tender of the balance of 10,000 feet which came by the steamer *Lake Champlain*.

The pretension of the defendants was that the lot to arrive shortly was deliverable by the Grand Trunk Railway Company before the opening of the navigation, and that it was not reasonable or equitable to ask the defendants to take delivery at so late a date as the 12th May.

The demand of plaintiffs was that defendants be compelled to take delivery of the balance and pay for the same.

PER CURIAM. By the broker's note, the delivery was to be in two lots, one out of store, and the other to arrive shortly, and deliverable by the Grand Trunk Railway Company.

The pretension of the plaintiffs is that so long as they were not required to deliver they were in time to deliver.

The vendees, on the other hand, say that the delivery was to be by the Grand Trunk Railway Company before the opening of the navigation, which was not offered, and, moreover, it was to be shortly after the 2nd February.

The difficulty here, as in most of these cases, is, that there was a fall in price of some 45 per centum.

This is a mercantile contract, and where the time is fixed, the default arises by mere lapse of time; C. C. 1069. Benjamin on Sales, p. 481, remarking on stipulations as to time, says: "In determining whether stipulations as to the time of performing a contract of sale are conditions precedent, the Court seeks simply to discover what the parties really intended, and if time appear, on a fair consideration of the language and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent."

Here, giving a fair consideration to the language of the contract and the circumstances of the case, we find that the iron was to arrive shortly, and to be delivered by the Railway. It was in the winter season, and if the time of delivery were extended into the summer, the delivery would be by a steamship in all probability, though there is imperfect evidence on this head, for I cannot supplement what is

wanting in the record by my knowledge as a citizen. Apart from this consideration it might be said that it was of no consequence to the defendant whether the delivery was by the Grand Trunk or by the river. It may have been, but, at any rate, I do not deem it necessary here to say whether delivery by the Grand Trunk was a condition precedent. We have the fact that the delivery of a portion of the part in dispute was not tendered until the 12th May—more than three months after the sale, and no tender appears of the entire balance or remainder. I do not consider an offer after three months of goods to arrive shortly to be an offer made within a reasonable time. Every day of delay was a gain to the vendor and a loss to the vendee, as shown by the fall in price of 45 per centum. The Court here determines what is not a reasonable time, having regard to the facts and circumstances of the case; further, it says that there was no complete tender of the balance, being 25,000 feet; and it finds against the vendors that they have no claim against the vendees.

Action dismissed.

W. W. Robertson for plaintiffs.

M. B. Bethune for defendants.

SUPERIOR COURT.

MONTREAL, April 30, 1881.

Before TORRANCE, J.

THE EXCHANGE BANK OF CANADA V. MURRAY, and BROWN et al., Opposants.

Privilege—The furnisher of coal for household consumption has a privilege for supplies furnished during the preceding twelve months.

The opposants claimed to be paid out of the moneys levied by the sale of the moveable property of defendant, the sum of \$237.46, for coal supplied to defendant at his domicile during the last twelve months before the seizure, which took place on the 27th February, 1879.

The sale and delivery took place as regards \$135.35 within the twelve months.

PER CURIAM. Is the furnisher of coal for family or household consumption entitled to a privilege for supplies furnished during the last twelve months?

There is no difficulty under the French Code, C. C. 2101. It is there held that the *fournis-*

seur de subsistances is entitled to the privilege. *Vide* Marcadé on this article at n. 92.

Our article, C. C. 2006, uses the word provision in both versions, and the meaning in both is the same. Bescherelle, in his dictionary, vo. "Provision," defines it as "*nom collectif de tout ce qui est compris dans la consommation alimentaire, l'usage et l'entretien de la vie domestique.*" There can be no difficulty in saying that the rule should be here as in France, and the privilege should hold.

Opposition maintained.

J. B. Abbott for opposant.

D. Macmaster for the bank.

COURT OF REVIEW.

MONTREAL, April 29, 1881.

JOHNSON, TORRANCE, PAPINEAU, JJ.

ROLLAND V. THE CITIZENS INSURANCE Co., and LAJOIE, plff. par reprise.

Jury trial—Verdict—Motion for judgment non obstante verdicto.

JOHNSON, J. This is a jury case, and a verdict has been rendered, and the plaintiff moves for judgment upon it in his favor; and the defendants also ask that judgment on the same verdict may be given for them. By art. 422, C. P., *the motion for judgment on the verdict can only be opposed by means of a motion for a new trial, a motion in arrest of judgment, or a motion for judgment non obstante verdicto.* The defendants take the last named course. By art. 433 *whenver the verdict of the jury is upon matters of fact in accordance with the allegations of one of the parties, the Court may, notwithstanding such verdict, render judgment in favor of the other party, if the allegations of the former party are not sufficient in law to sustain his pretensions.* Whatever may have been done before the code, and some very strange things were done (see cases of *Ferguson v. Gilmore*, 1 L. C. J. p. 131, and *Higginson v. Lyman*, 4 L. C. J. 329), that is the law now; and that is the law laid down in the judgment of the Court of Appeals in the case of *Fletcher v. The Mutual Fire Insurance Co.* disposed of last term. The defendants do not now come before the Court, and ask to set aside this verdict, and get a new trial. They ask that the verdict should stand, and remain as it is, and though standing, that they should get judgment. Why? not because the declaration does

not show a right of action; but because *the evidence and the verdict show that the policy did not cover the loss ! That is the sole ground taken in the motion*, and, therefore, I will not look at any other ground—such as the sufficiency of the amendment made at the suggestion of the Court of Appeals. I will not supply a ground that the party refuses to take. There is a consent, however, that the evidence be looked at; but what would be the use of that, under any circumstances, since the only consequence even of finding that the verdict was contrary to evidence would be that the verdict should be set aside, and a new trial granted, neither of which is asked for; but only that the verdict, standing as it does, may be allowed to stand, and judgment, *without new trial*, go for the defendant upon the record as it stands. That appears to me to be plainly impossible in the face of this verdict, which, whether founded on evidence or not, is not asked to be set aside; and, under Article 422, I think judgment must be entered for plaintiff.

As to the consent that the evidence should be looked at, the only consent of record is that of 13th December (the day of trial), and it says that the evidence at the former trial is to serve at that one; and that, upon the final hearing of the cause, the court is to refer to it as explanatory of the verdict to be rendered. That was plainly a consent that the evidence was to be used for legal purposes, not for the purpose of giving the defendants a right to urge what they cannot urge by law: it is a consent merely that the evidence be looked at *pour toutes fins que de droit*, and cannot cover the defendants' adoption of a wrong remedy.

Plaintiff's motion granted. Defendants' motion dismissed with costs.

F. X. Archambault & Co. for plaintiff.

Abbott & Co. for defendants.

SUPERIOR COURT.

MONTREAL, March 17, 1881.

Before SIOGTE, J.

LATOUR v. BRUNELLE, and LARBAU et al., T.S.

Attachment before Judgment—Secreting properties—Compensation of debt with costs.

PEN CURIAM. The plaintiff has taken an attachment before judgment for the payment of his bill as doctor. The amount claimed was

\$130. The Court on the merits has allowed \$12, and has compensated this sum in deduction of costs due to the attorneys of defendant, on the petition to quash the attachment before judgment. The plaintiff's allegations for attachment were, 1st. That defendant was leaving the Province of Quebec to go over to the United States; 2nd. That defendant was secreting her effects, moveables, &c., to defraud her creditors. The first allegation is altogether unfounded. It was alleged in the second, that the concealment consisted in the fact that defendant had sold all her effects, movables, &c., to one Joseph Poirier, some time before the attachment. This sale had been effected for the sum of \$2000, which had been handed over to some of the defendant's privileged creditors who were holding these effects, movables, &c., in virtue of executions, when this sale took place. The sale was a public one, and the plaintiff has failed to prove any fraud. The Court is of opinion that this sale was regular and was a *bona fide* transaction, from which the defendant derives no personal profit. The attachment is quashed. The judgment of the Court is as follows:

"La Cour, etc. :

"Considérant que l'action est dirigée contre la défenderesse, comme la veuve de Gonzalve Doutre, pour soins et remèdes fournis à ce dernier, et pour soins et remèdes fournis à la défenderesse depuis la mort de son mari ;

"Considérant qu'il est constant, que le demandeur, par écrit, en date du vingt-six Novembre mil huit cent soixante-et-dix-neuf, s'est obligé de soigner, comme médecin, le dit Gonzalve Doutre et sa famille, moyennant cent piastres par an, payables par trimestre, dont \$10 payées à compte du premier trimestre ;

"Considérant qu'il est constant que la défenderesse est séparée de biens, d'après ses conventions et stipulations de mariage, avec son mari, et qu'elle n'est pas responsable des dettes de ce dernier ;

"Considérant qu'il est constant que depuis la mort de son mari, le demandeur a donné des soins et remèdes à la défenderesse, et que la somme de douze piastres est une somme plus que suffisante pour l'indemniser ;

"Considérant qu'il est constant que le demandeur n'a jamais fait connaître avant l'action,

à la défenderesse, qu'elle lui fut endettée, ni fourni un compte contre elle personnellement, accorde au demandeur la dite somme de douze piastres, sans frais, et déboute l'action quant au surplus.

"Et la Cour considérant, en fait, que la défenderesse, lors de l'action et de la saisie-arrêt, et longtemps avant, ne possédait aucuns biens et les avait vendus, à la connaissance du demandeur, à des créanciers antérieurs et privilégiés, pour s'acquitter envers eux de plus forte somme ;

"Considérant que le demandeur était mal fondé à déclarer que la défenderesse recelait et était sur le point de receler ses biens et de laisser incontinent la Province de Québec ;

"Considérant que la défenderesse a fait preuve de la fausseté des allégations de recel et de fuite faites par le demandeur dans son affidavit pour obtenir le bref de saisie-arrêt, et que la défenderesse a justifié sa requête pour annuler la saisie-arrêt ;

"Considérant que le demandeur a procédé par saisie-arrêt, sans cause et dans le but de harasser la défenderesse, et qu'il lui a causé trouble et dommage par cette procédure vexatoire, déboute la dite saisie-arrêt, et maintient la requête de la dite défenderesse pour annulation d'icelle saisie avec dépens distracts à M. J. E. Robidoux, avocat de la défenderesse ;

"Considérant que sous les circonstances, la défenderesse ne doit pas être condamnée aux frais pour et à raison de la somme et dette allouée au demandeur ;

"Considérant qu'il est juste, pour empêcher litigation ultérieure, de compenser la dette et condamnation de douze piastres au profit du demandeur, avec les frais que ce dernier est condamné à payer à la défenderesse et qu'il lui doit, la Cour prononce la dite compensation et déclare que le demandeur paiera les frais accrus au profit de la défenderesse sur sa requête ; moins cependant les douze piastres représentant la dette que lui doit cette dernière."

Barnard & Co. for plaintiff.

J. E. Robidoux for defendant.

NEW PUBLICATION.

We acknowledge receipt of a copy of Stephens' "Law and Practice of Joint Stock Companies," (Carswell & Co., Toronto), which will be noticed hereafter.

SALVAGE OF SPECIE.

No maxim perhaps is more frequently insisted on than that which forbids a judge to decide more than is necessary for the case in hand. At the same time none is more difficult to adhere to, and the judgments even of our best judges abound in *obiter dicta*. A curious instance of this arose a few days ago in the Admiralty Division in the case of *The Longford*. This vessel had the misfortune to get into a collision in the river Mersey, and, being obliged to accept assistance, was subsequently sued for salvage services rendered. At the time of the services she had on board a clerk of the Bank of Ireland with £50,000 in specie in his possession, and its owners contended at the trial that, as, even if the ship had sunk at once before the arrival of assistance, the gold could have been easily recovered by divers, it ought not to contribute to the salvage award in the same proportion as the ship and the rest of the cargo.

The earliest reported case of this character is *The Jonge Bastiaan*, 5 C. Rob. 322, which was decided in 1804. In that case there was first an unsuccessful attempt to save the vessel by a single smack, at the end of which the master left the vessel in the smack, taking with him a quantity of bullion, and a second successful attempt by six smacks. At the trial it was contended that the bullion should not contribute, but Sir W. Scott (Lord Stowell) overruled the objection. The next reported case in which the principle of making separate allotments on the ship and on the cargo seems to have been discussed is *The Vesta*, 2 Hagg. 193, which came before Sir C. Robinson in 1828, and there that learned Judge distinctly says, "The principle of giving specific proportions of the property saved is an inconvenient rule in itself," and "I do not approve the distinction ;" and he gives as his grounds "that the difference of danger to which the property is exposed would be a most difficult criterion to be applied in most cases," and that "to uphold such a notion would lead to preferences in saving one part of a cargo before another." It is true that in this case no part of the cargo was silver or bullion, but it cannot be said that the subject was not present to his mind, for in the course of his judgment he incidentally remarks : "Suppose, for instance, a casket of jewels on board which might be saved with great facility ; it could not

be contended that the salvors would only be entitled to a small gratuity for carrying it on shore." This being the state of the law on the subject, the case of *The Emma*, 2 W. Rob. 319, a timber-laden vessel, came before Dr. Lushington for decision in 1844, and it is in the judgment delivered in that case that the dictum occurs which was the sole ground of the contention just raised by the owners of the specie in the case of *The Longford*, and overruled by Sir R. Phillimore: "The ordinary usage," says Dr. Lushington, "is to take the whole value of the ship and cargo, and assess the amount of the remuneration on the whole, each paying its due proportion. I am not aware, excepting in the instance of silver or bullion, that any distinction has ever been taken, or that parties have been permitted to aver that the services were of greater importance to the ship than to the cargo, and, therefore, that the ship should bear the lesser burthen, or *vice versa*. Such a distinction, if acknowledged, would in many cases lead to intricate litigation and to questions of great nicety, which it would be exceedingly difficult to adjust. With respect to silver and bullion it is true that a distinction is wisely and properly permitted, and this upon the consideration that it is more easily rescued and preserved than more bulky articles of merchandise." This is, perhaps, one of the most arbitrary dicta ever promulgated. No foundation for the rule is to be found of prior date, and Sir R. Phillimore disposed of it in very few words: "The attention of the court," said the learned judge, "has been drawn to other cases, especially to the case of *The Jonge Bastiaan*, (*ubi sup.*), from which it is clear that if any such rule as that referred to existed it would have been mentioned. With regard to specie it is like any other cargo."

This decision has removed a difficulty felt by all the writers of text books (Parsons II. 295; Pritch. Dig. II. 796) who have noticed the point, whose only course has been to place the conflicting decisions side by side and leave the matter in doubt.

It has further brought the English law into conformity with the American, a desirable thing from an international point of view: *The T. P. Leathers*, 1 Newb. Adm. 421; *Warner v. La Belle Creole*, 1 Peters Adm. 46; *Marvin on Wreck and Salvage*, 174.

It has, thirdly, brought the rule in salvage cases into conformity with both the English and American rule in cases of general average. No valid distinction can be drawn between the two cases, and in the latter no doubt has ever rested on the point. From Magens and Emerigon to Chief Justice Best, *Brown v. Stapylton*, 4 Bing. 119, all concur in the principle that all cargo put on board for the purposes of commerce, however light its weight and considerable its value—gold, silver, or jewels—must contribute to general average losses for its full value, and a doubt has even been raised as to whether the valuables of passengers not actually carried about their persons are not liable to contribution.—*Law Times* (London).

LAWYERS AT COLLEGE.

Many of the best English lawyers were not only good lawyers, they were also good scholars. Sir Frederick Pollock was the senior wrangler of his year, and the next year was elected Fellow of Trinity College, Cambridge. Lord Lyndhurst was second senior wrangler and second Smith's prizeman, and was also a Fellow of Trinity. Sir Nicholas Tindal was first medalist and senior wrangler. Mr. Justice Littledale was senior wrangler and first Smith's prizeman. Lord Langdale was senior wrangler and first medalist. Baron Alderson was senior wrangler, first medalist, and first Smith's prizeman—three prizes that have very seldom been taken by one man. They were the highest honors, both in classics and mathematics, which his university could bestow. During his course he gained the Sir Thomas Browne medal for the best Greek and Latin epigrams, and the members' prize for the Latin essay, and was also elected Fellow of his college. A lawyer, once applying to him while on the bench for a *nolle prosequi*, pronounced the penultimate syllable of *prosequi* long. "Stop, sir," said Alderson, "consider that this is the last day of term, and don't make things unnecessarily long." Dr. Donaldson, the eminent classical scholar, in answer to some reflections that had been made in Parliament on the Civil Service examination in Greek and Latin, called attention to Alderson's scholarship, and particularly to a note by Alderson in vol. 4, p. 129, of *Barnwell & Alderson's Reports*, on the verb *edo*. His knowledge of mathematics secured his retainer for the con-

testants before the committee of the House of Lords when the bill for the London & Birmingham Railway was before that House, and to him was confided the duty of cross-examining George Stephenson. He succeeded in confusing Stephenson with his figures, but the engineer could not be confused by the facts, and answered, when Alderson endeavored to show that it was impossible to get a steam engine with cars attached around a sharp curve, that all he knew about it, was that he had done it.

Lord Eldon, Mr. Justice Taunton and Lord Tenterden, each took the Chancellor's English Essay Prize. Eldon's subject was the Advantages and Disadvantages of Foreign Travel; Tenterden's, the Use and Abuse of Satire, and Taunton's was Popularity. John Taylor Coleridge won the Chancellors' prizes for prose composition, both in Latin and in English. Foss says this has happened only three times since the foundation of the prizes—the three conquerors being Coleridge, Rev. J. Keeble, and Henry Hart Milman, Dean of Canterbury. The subject of Coleridge's English Essay was Etymology. Chief Justice Cockburn, while at college, gained prizes for the best exercises in English and Latin, and afterward for the English essay; Lord Westbury distinguished himself by attaining a place in the first class in classics and in the second class in mathematics, and was elected Fellow of Wadham College, Oxford; Mr. Justice Maule was senior wrangler, and Fellow of Trinity College, Cambridge; Lord Wenleydale was a fifth wrangler, and senior chancellor's medalist; Vice-Chancellor Shadwell was a seventh wrangler, a chancellor's medalist and Fellow of St. John's College, Cambridge; and Vice-Chancellor Wigram was a fifth wrangler, and Fellow of Trinity College, Cambridge. From this list it would appear that it does not necessarily follow that because a man has taken prizes at college he will not take any after he has left college. Dr. Donaldson has said that the honor of being senior wrangler is worth \$50,000 in the prestige and other advantages it gives to the student gaining the honor.

GENERAL NOTES.

The New York city bar is to be congratulated on having a member wealthy enough to indulge anti-quarian tastes. Mr. Hamilton Cole recently paid \$8,000 for a copy of the famous Masarine Bible, the first book

known to have been printed with movable types, printed by Gutenberg about 1455.

Of Judge Archibald Macdonald, of Guelph, Ont., late judge of the County Court of Wellington, who is recently deceased, after a judicial service extending over twenty-four years, the *Canada Law Journal* says, "he was a man of sound common sense, a good lawyer, and much respected by his many friends."

HARD UPON THE BENCH.—In *Horton v. Champlin*, 12 R. I. 550, the Court remarks: "Within my own experience I have known lawyers to make points in a case almost as a matter of desperation, and to succeed by them. There is hardly any nonsense for which some authority cannot be found in a large law library."

On the Whittaker trial it is proved that on the opinion of Messrs. Payne and Southworth (professional experts) Mr. Palmer an employee in the Montreal Post Office, was dismissed, but on the confession of another was reinstated. In that case Mr. Payne said that if the writing in question was not Mr. Palmer's, then the experience of his own lifetime had been in vain.—*Alb. L. J.*

We regret to learn that the publication of the *Weekly Jurist*, of Bloomington, Illinois, is to be discontinued next week, on the completion of vol. 2. The reason assigned is "the great difficulty in making collections." Some people do not seem to realize that it is an act of dishonesty to subscribe to and receive the benefit of a journal for which they neglect and refuse to pay.

Of Vice-Chancellor Malins, who has retired from the Bench, the *Law Journal* says: "The learned judge is justly most popular with the legal profession, and throughout his career on the bench has been guided by an earnest desire to do justice. He would have earned a higher reputation as a lawyer if he had lived in the times before the system which he had to administer became stereotyped. He had all the instincts of justice, tenacity of purpose, and disregard of opposition, which would constitute a founder of the system of equity. These very qualities stood in his way as a judge in these latter days, so that his reputation as a lawyer was hardly equal to his powers."

A CANADIAN BARONY.—The recent recognition by Her Majesty of a Canadian barony is an exceptional circumstance, and the gentleman (Baron de Longueuil) whose title has been acknowledged, holds the remarkable position of being the only subject of the Queen who is a colonial peer, and who at the same time has not any precedence. The feudal barony is entirely exceptional, and is the only Canadian hereditary title existing. The patent of nobility signed by King Louis XIV, granting this title to Charles Le Moyne for distinguished services, is remarkable as creating not only a territorial barony, but also conferring a title of honor upon himself and his descendants, whether male or female. The cession of Canada to England, by the treaty of Paris in 1763, made no change in the legal right to hold honors; since this period each successive head of the family has, by assumption of right, used the title; but it was not officially recognized by the British Government until December 4, 1880.—*Debreit's Peerage*, 1881.

The Legal News.

Vol. IV. MAY 7, 1881. No. 19.

THE NEW CHIEF JUSTICESHIP.

We are glad to notice, from a bill introduced by the Attorney General, that the suggestion made by Mr. Justice Torrance in a recent letter (p. 58 of this volume) is about to be carried out. The suggestion was that there should be a Chief Justice of the Superior Court for the Montreal division. It is stated that Chief Justice Meredith approves of the proposition, and that the bill has his concurrence. The first Chief Justice, it is understood, will be Mr. Justice Johnson, the senior Judge of the district.

THE LAW OF LIBEL.

Mr. Irvine is doing a good work in amending and clearing up the obscurities in the law of libel. As the law is now interpreted, the press is placed under restrictions in this Province, which do not exist elsewhere. We have not yet seen the bill introduced by Mr. Irvine, but we understand that a prominent feature of it is to permit the defendant in a libel suit to plead the truth of the charges, and that the publication was made in the interest of the public.

LEGAL STUDY.

The *American Law Review*, for May, has an instructive article by Mr. Wellman, on admission to the bar. Law students will find it profitable reading. In a further notice of the subject in the same issue, the writer says:—"Many students, even some who have to make their living, are pressed by a great temptation to shirk thorough work, and shrewdly to pick out of the books the things which go a great way both in and out of school, notwithstanding the warning of their teachers that such a method, like a donkey engine, only works where it is carried. Of such students, the rich ones want speedy admission to the bar; the poor ones want business of some sort, and they need to get it soon. Consequently they often yield to the pressure of what they believe to be a necessity, and some of the ablest of them become intellectual vagrants, who give occasion to the saying, that

lawyers can half learn a thing better than anybody else. This fatal facility is rapidly developed in the green wood, and becomes monstrous in the dry. A lawyer of great experience once said, in a conversation about the study of law, 'There is but one chance for a man to get his law, and that is at the beginning.' This is to be taken, of course, with the modifications understood in reasonable conversation. It indicates, however, a fact with which old practitioners have become too familiar, and which, year after year, surprises the aspiring beginners who have trained themselves to study their cases with a certain effort at perfection. It is that the men who, from necessity or choice, began the practice of the law without forcing themselves to take the time and the pains to control their circumstances, whether in riches or poverty, and to undergo long and well-directed labor in examining the authorities, and in considering the established or growing principles which make the life and health of the law as a great factor of civilization, rarely have the requisite pluck afterwards, or having it, rarely find the time to educate themselves over again. It takes intellectual enthusiasm to follow in any profession the example, for instance, of Descartes in philosophy, by surrendering acquired habits of thought, and even well-considered opinions, and beginning at the bottom to learn the rudiments of what, at heart, one knows that he is ignorant. Many fear that it is not worth while to begin again. They surrender. It may not be their fault. Nature may have taken them by surprise and exhausted their youth before they find out that they have a choice in the matter. Nor do we wish even to seem to disparage such men, by suggesting that it is their misfortune. That might be as absurd or as inconsiderate as to take pains to cry out against a poet that he is no mathematician, or against a merchant that he is no scholar. It is simply a fact. It is a fact that many well-known, able and useful practitioners and judges are not, and have never tried to be, thorough lawyers. The fact that they have never tried to be thorough lawyers, is the point which we now urge as the reason why they are not. It is a very simple thing to say; but it is wholesome for candidates for admission to the bar to verify it by examining the briefs and decisions which prove it. They

are easily found, and are an edifying illustration of the principle, that although it be ignored, the law of cause and effect does not cease to play. In the long run, the bench and the bar become what the candidates for admission to the bar please. Yet, since it is a part of a lawyer's business to have the end in view from the beginning, it is well to try to pass the critical incident of entering the bar upon a plan that is worth working upon to the end."

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, April 8, 1881.

Before RAINVILLE, J.

Ex parte ROSE DELIMA PAGÉ, Petitioner for certiorari.

Quebec License Act—Amendment of 1879 is applicable to restaurants.

PER CURIAM. The petitioner was convicted of having, from eleven of the clock in the evening of Saturday, the 13th November, 1880, until Monday following at five in the morning, neglected to keep shut the bar of a certain restaurant, then kept by her, on St. Catherine street, in the City of Montreal, contrary to the License Act, 1878.

She complains of this conviction on the ground that the Act in question had been repealed, so far as concerned the offence in question, by the Quebec Act of 1879, 42 & 43 Vict. cap. 4, s. 1.

We are informed that the conviction was based upon the Act of 1878, on the ground that so far as the petitioner was concerned, the law had not been changed. The Statute of 1879, in its preamble, refers only to taverns, but the enacting clause is in these words:

"Every person licensed or not licensed to sell by retail, in quantities less than three half-pints, in any city, town or village whatsoever, spirituous liquors, wine, beer, or temperance liquors, shall close the house or building in which such person sells or causes to be sold, or allows such liquors to be sold, on any and every day of the week, from midnight until five o'clock in the morning, and during the whole of each and every Sunday in the year, &c."

It is evident that the preamble of this Act does not refer to restaurants, but to taverns; but the enacting clause has no such limitation,

but refers to houses or buildings generally, in which liquor is sold. Is the enacting clause to be limited by the preamble? Dwaris on Statutes, says, p. 655: "The preamble to a statute usually contains the motives and inducements to the making of it; but it also has been held to be no part of the statute." So also pp. 656, 657, 658.

The conclusion, therefore, is that the enacting clause should prevail, and this being the case, no offence was committed between 11 and 12 on Saturday night as charged, and the conviction should therefore be quashed.

Conviction quashed.

Augé for petitioner.

Ethier for the City.

SUPERIOR COURT.

MONTREAL, April 28, 1881.

Before TORRANCE, J.

MONTPETIT V. PELADEAU.

Deposit—Proof—Interrogatories on faits et articles—Division of answer.

The avoué of the party may be divided when part of the answer is improbable, or invalidated by indications of bad faith.

This was an action to recover from the defendant \$100 alleged to have been confided by plaintiff, through Mlle. Sophie Jobin, to defendant, to be deposited in the Savings Bank in the name of plaintiff. The complaint was that defendant had converted this sum to his own use, paid interest on it for two years, and no more. There was a second count setting up a loan to defendant. The plea was the general issue.

PER CURIAM. The first witness examined was Peladeau himself. He says that on the 26th February, 1875, he received from Mlle. Jobin the sum of \$100 to deposit in her name in the Savings Bank, and he had returned it to her, save \$2 and a few cents. The entry was made in the Bank book, produced as plaintiff's exhibit number one. He further on explains that the deposit was made in his own name, as he had deposited before. He drew it out the following day at the request of Mlle. Jobin, who wanted it. Further on he is asked if a short time before the death of Mlle. Jobin, she had not asked him, in presence of Mlle. Denault, if the money was still in the bank in the name of plaintiff.

He denied this. He said he had seen the book in the hands of M. Turcotte, who went to the Bank to draw the money. He is asked if he had not given the deposit book to Mlle. Leonard, and denies it. He also denies having given the book and \$6 for interest to Mlle. Leonard. He said Mlle. Jobin gave him \$6 to pay Mlle. Montpetit for wages. He said Mlle. Jobin gave him \$6 to give Mlle. Montpetit, and he had kept it, because he had an account of his own against her nephew, M. Montpetit. He says he did not speak of wages before Mlle. Leonard. The next witness examined was Mlle. Leonard, who says that Mlle. Jobin did not pay wages to Mlle. Montpetit. The book was given her by Peladeau, and \$6 in 1877 for interest. He told her that Mlle. Jobin sent her the book to keep it safe. In 1878, he gave her the book, with the remark that he did not give the \$6, because Michel Montpetit owed him. Mlle. Denault is next examined. She denies that Mlle. Jobin paid Mlle. Montpetit any wages. She was present at a conversation between Mlle. Jobin and Peladeau, and Peladeau then said he knew the money did not belong to Mlle. Jobin, but to M. Montpetit, and that it was correct in the Bank. Michel Montpetit was the last witness examined. He denied that he owed \$6 to Peladeau, and speaking to Peladeau about it, the latter said it was not true he had said so. Montpetit told him that Mlle. Montpetit was going to sue him, and he said, let her not put costs upon me and I shall get money from Mlle. Masson. Peladeau had also admitted to Montpetit the letter produced as coming from him. Peladeau in his examination had denied any knowledge of the letter. The establishment of the charge against Peladeau depends largely upon the admissibility of parol testimony against him—taken in connection with his admissions under examination in the witness box. We have first to notice his plea, which is the general issue simply. In the witness box, he admits receiving the money from Mlle. Jobin, and at first says he deposited it in her name in the Bank. But later on he corrects himself, and says that the deposit was in his own name in his own account. This is a variance which may have some significance. Then we have the curious fact of the withdrawal of the money the day after the deposit. The excuse was

that Mlle. Jobin wanted it again. Is it likely that Mlle. Jobin, living at Isle Perrot, 20 miles from town, after giving Peladeau the money to be deposited in her name in the Bank, would ask for it immediately? Next, there is the surrender by Peladeau of his own deposit book to Mlle. Jobin, as representing the deposit, and as if he had nothing to do with it. Why should he give her the book if he had already returned the money? Further, there is the payment of interest proved by Mlle. Leonard, and the entries in his deposit book showing the payments. There are lastly the contradictions between his statements and those of Mlle. Denault, Mlle. Leonard and Michel Montpetit, who were without interest in the suit. The Court was witness of the manner and expressions of Peladeau under examination, and draws its own conclusions as to his veracity and truthfulness. It has no hesitation in saying that no reliance is to be placed upon the statements of Peladeau. Further, that he has committed wilful and corrupt perjury in the case. The rules which apply to a case like the present are simple. C. C. P. 231 says: "The answer of any party to a question put to him may be divided in the following cases, according to circumstances, and in the discretion of the Court: 10 . . . 20 When the part of the answer objected to is improbable or invalidated by indications of fraud or of bad faith, or by contrary evidence. Further, I would refer to the case of *Goudreau vs. Poisson et al.*, 13 L. C. J. 235, where the Court of Appeals held that in such cases the admission could be divided, and also where the statement under oath did not agree with the pleading. Looking at all the circumstances of the case, and endeavouring to use a careful discretion, the conclusion of the Court is to condemn the defendant as a *dépositaire infidèle* and as the holder of the plaintiff's money.

S. Pagnuelo, Q. C., for the plaintiff.

H. St. Pierre for defendant.

SUPERIOR COURT.

MONTREAL, March 17, 1881.

Before JOHNSON, J.

LA BANQUE NATIONALE v. LESPÉRANCE et al.
Guarantee Insurance—Deficiency in Accounts of Bank Teller.

The Teller of a Bank endorsed on a parcel of bank notes the amount which it was supposed to contain. It was subsequently discovered that the parcel was \$6,300 short, and it was ascertained that a deficiency of the same amount existed in the Teller's accounts, and had been during several years skilfully covered up and concealed from the knowledge of the authorities of the bank, who had made the usual inspections.

That a Guarantee Insurance Company which had guaranteed the fidelity of the Teller was liable for the deficiency, but only to the extent which occurred after the contract was made.

PER CURIAM. The defendant, Lesperance, was a teller in the Banque Nationale, and the other defendant (the Canada Guarantee Company), guaranteed his fidelity. The first policy was granted on the 1st of May, 1878, for a year; and when that expired, it was renewed for another year. In December, 1879, the Bank took the present action against both of the defendants, alleging a defalcation of \$6,300 by Lesperance, and the joint and several liability of both of them under the bond.

The declaration specially avers that on the 23rd May, 1879, while the policy subsisted, Lesperance, at the close of his day's work, locked up the cash and securities under his control in the usual manner, and went to his home, which appears to have been at Longueuil. That the 24th and 25th of May were both of them holidays, one being the Queen's Birthday and the other a Sunday; and the Bank only opened its doors again on the Monday morning, and Lesperance being unable to come, sent his keys to the Manager. That amongst the values in his cash box, the defendant had tied up a parcel of bank notes to be sent to the principal office at Quebec, and had endorsed on it what were supposed to be its contents, viz., \$10,363; that this parcel was sent off by the express to Quebec on that same afternoon, and it was there discovered that instead of containing \$10,363, as shown by the writing on the back of it, the parcel only contained \$4,063, making a deficiency of \$6,300. That after referring to the Express Company and making a minute inspection, the Bank came to the conclusion that he was a defaulter to that amount, and had been so for some time previous to this discovery. That the Bank forthwith gave notice to the Insurance Company, offering to give them commu-

nication of the books and accounts, and to do everything that might be desired of them in order to ascertain the facts; and they, the Insurance Company, actually made a minute examination of the thing for themselves, and convinced themselves that the defalcation really existed. That the Bank further, in pursuance of a stipulation in the policy to that effect, caused Lesperance to be arrested on a criminal charge at their request, and alleging that they have done everything they were bound to do, they conclude for a joint and several condemnation of the defendants for the missing sum.

The defendant, Lesperance, pleading for himself, answers in effect by telling the plaintiffs to prove their case. He says there is no deficit; that when he left the Bank on the 23rd of May his cash and securities were all right, the \$6,300 included, and if the money has disappeared, it must be by the fault of the Express Company, the Quebec branch or the Manager here. The Guarantee Company pleads, firstly and secondly, certain conditions of the bond requiring preliminary proof before action brought, and that the plaintiffs should prosecute criminally. The third plea denies the guilt of Lesperance, and alleges that when he left the Bank on the 23rd, he left the money and securities under his control in the coffers of the Bank intact; and that, meeting with an accident on the 24th, and not returning to the Bank on the 26th, he sent his keys to the Manager, who received them, counted the cash and securities, and certified them as correct in the Bank's books, which was true, and he (Lesperance) is thereby relieved from all further responsibility.

The Guarantee Company's fourth plea is, that if any loss has been sustained by reason of Lesperance's acts, it was sustained previous to the execution of the bond. That the Bank's claim is based on error in ascertaining the result of entries in the Bank's books, which have been irregularly kept for years prior to the bond. There was a motion made at the hearing to add to the other averments, to the effect that any such deficiency could only have occurred by the gross negligence and carelessness of the Bank, and was concealed from the assurers at the time the risk was first taken. I think this addition may be made without injustice or inconvenience, and will be sufficiently met by the general answer,

The case must be looked at first of all with respect to Lesperance. If he is a defaulter, there is an end of the matter as far as he is concerned; but the case of his surety must be looked at on its own merits, and raises different questions. The evidence is very bulky and hard to master. It is all taken under the old system of the *Enquête au long*, so long used, or rather abused, in this Province, and fitter at all times to baffle than to assist justice. It will suffice for me to state the conclusions which I draw from it, and which enable me to base my judgment in the case, both as to the liability of the officer of the Bank, and as to that of his surety. First then, as to Lesperance himself. The whole thing is a question of evidence, and all the facts and circumstances must be considered. His own evidence, whatever may be its effect for or against the other defendant, can, of course, have no effect at all to exonerate him from direct liability to his employer.

The facts are correctly stated in the declaration as to the time of Lesperance's leaving the bank on the afternoon of the 23rd, his absence the next day, which was the Queen's birth-day, and also the next day, of course, which was a Sunday. On the Monday morning he sent his keys, by his brother, to the manager, who found himself somewhat embarrassed, as there was another clerk absent on leave at the time, and who usually took Lesperance's place when the latter did not come to the office. But he did the best he could. He found Lesperance had left separate parcels tied up with string, and having slips of paper on them mentioning, in Lesperance's hand-writing, the amount in each parcel, one being endorsed \$10,363, B. N., Quebec; and there were also loose bills. As the Manager had to go behind the counter himself, and do the work of the day, he had not time to undo the parcels and count the contents; so he trusted to what was written on the slips. As to the loose bills and checks, however, he counted them. Later in the day, the Manager, having to send a round sum to Quebec, took \$4,637, tied them up and added them to the parcel left by Lesperance containing apparently \$10,363, intending to send off \$15,000; and the messenger enclosed the whole in a paper cover, sealed it up, and delivered it to the Express; and in that state the parcel and contents were, the next day, delivered at the office of the

bank in Quebec, where the teller (Boucher) received it, opened it and saw the contents, but did not immediately count the money, and put the whole into his safe until the next day, when he untied the parcels or bunches of bills; found the \$4,637 (which had been put in by Sancer) all right, but the one which had been done up by Lesperance lacked \$6,300. This is the first appearance, or first discovery, of any deficit at all. The next thing that happened was that this was notified to the office at Montreal, and the Inspector, Mr. Matte, was sent up to make inquiry and examination. There can be no doubt whatever of the result of Mr. Matte's investigation, which was, according to his sworn evidence, to establish Lesperance's defalcation precisely to this amount, viz, \$6,300, and extending over a considerable time back. This is the result to which the evidence has conducted my mind. There is much in it which it was difficult to apprehend clearly at first; but I have referred to it over and over again, and I cannot say there is any cause for reasonable doubt. There were witnesses examined on Lesperance's behalf—witnesses of great respectability no doubt—residents of Longueuil, who testified to his general good character and habits, and to their own disbelief (whatever that may be worth), of his having used the money. These gentlemen spoke of the bringing of the criminal charge, and of its having been abandoned. Whether it has been abandoned or not, does not clearly appear; nor, indeed, is it at all important to know whether a criminal charge for having stolen the money is maintainable against him or not. If this money, which had been in his custody, is missing after a careful inspection, he ought to give some account of it. It is impossible to shut one's eyes to the reasonable and proper effect of the inspector's evidence, or to the circumstances attending it. I forbear from emphasising every point; but it must be remembered that he had the defendant, Lesperance, with him in the vault, as a *légitime contradicteur* as it were, and he was constantly referred to for explanations, which were not forthcoming. It is broadly contended that Mr. Sancer himself may have taken the money from the parcel left by Lesperance; but where is the evidence that the \$6,300 were ever in that parcel? There is positively none whatever. Then, there is the

circumstance of the slip, without the money, being in the middle of the parcel; and those who are used to these things, and know all about them, say such a thing as that is very unusual and suspicious. But the theory of Sancer's responsibility might be admitted up to a certain point of time with plausibility perhaps; that is to say, as long as it is a question of veracity between him and Lesperance; but when the thing is pursued further, and it is found that this very amount was missing from Lesperance's cash, their relative positions are very much changed. The inspection showed that Lesperance, not Sancer, was the defaulter. What interest had Sancer therefore in putting a false slip into the parcel? Then it was said that Sancer, in answer to one of the telegrams from Quebec, had said that he felt sure the whole of the money had been sent, and this was argued upon as an admission on his part of the fact. Of course, when it is fairly looked at, it is only an admission of Mr. Sancer's confidence up to that time—before the inspection had taken place—nothing more.

This proceeding is not an inquisition to discover who took the money, but an action based on the distinct allegation that Lesperance took it, or, at all events, is responsible for it; and that, of course, must be proved by evidence inconsistent with any other reasonable hypothesis. Can it be pretended reasonably that Sancer, who had no deficiency, no motive, is to be put in the place of him who had both? It cannot escape observation, that what came to light previous to the inspection, that is to say, what took place at the end of May, was not the deficiency itself, if I may so speak, it was only the evidence of the deficiency. It was not then that the money was appropriated or lost, though it was only then that it was discovered. The person who left the slip with \$10,000 odd written on it, when there lacked \$6,300 of the amount, was a person who had an interest in hiding an already existing deficiency. It could not have been Sancer, therefore. It would be cruel and monstrous to entertain such a proposition. Mr. Sancer is not being tried here. If he is a defaulter let him be accused, and let him defend himself. The only question now is whether the evidence shows Lesperance to be liable, and I have come to the conclusion on this evidence that it does.

The defence of the sureties is, as I have said, different. Their three first pleas have received a sufficient answer by what has been already said on the issue with Lesperance. The deficiency is there, and the notices to the Company were given. Their fourth plea, however, regards the time at which this deficiency occurred, and the amendment is in effect that the Bank was guilty of gross negligence, and ought to have been aware of it, and have informed the Guarantee Company before contracting with them. The general answer puts all this in issue, and it does not appear that the Bank knew, nor, therefore, that it could inform the Company, of any deficiency previous to the bond. If they had voluntarily suppressed anything they knew, or were bound to know, it might vitiate their contract with the Company, no doubt; but if they were only cleverly defrauded, without the ordinary inspections and precautions usual in business disclosing the fact, they are not to be reproached on that score. They could not give notice of what they did not know themselves. Therefore this contract is not to be avoided on account of their not informing the company of things that were not within their knowledge in the ordinary course of a prudently conducted business. But admitting that the contract exists would not make the Company liable for deficiencies that occurred before the execution of the bond, whether the Bank knew of such deficiencies or not. The Company makes a much stronger case for Lesperance than he has made for himself. They produce evidence of the cuttle-fish kind. They obscure the evidence of Matte. They produce a Mr. McDonald, an accountant, against whom I have not a word to say; but in dealing with his evidence I must say what I think of it. Mr. McDonald was employed by the Company as a professional man to investigate and report upon the case for their satisfaction. I have no doubt he has done so very ably and very honestly; but the amount of it is that he reports to them that they should resist the plaintiff's claim upon the ground that all the allegations contained in Mr. Matte's deposition are susceptible of refutation; but it is evident he has misunderstood Mr. Matte's evidence, which was given in French, and a translation of it handed to the witness. He says he made his report, and that

it is true. The report is that, upon a certain theory which he propounds, Mr. Matte's conclusions may be susceptible of refutation, and that possibly no deficiency may have occurred at all. Mr. McDonald cannot be admitted, however, to judge of the effect of Mr. Matte's evidence, except as to its effect on himself as an expert. He says that upon his theory it is susceptible of refutation. Then by all means let it be refuted,—but refuted by facts and proof, not by hypothesis and opinion. There is the deficiency clearly shown, as far as Lesperance is concerned; but when, and to what extent with reference to the time of the contract? In my judgment, after devoting much time to this case, I think that the Company's guarantee can only apply to the deficiency of \$1,400 clearly shown to have occurred after the contract. It was a contract to make good the consequences of any misconduct that might occur after it was made. By no rule can it be made to apply to deficiencies occurring previously. Those were purely at the risk of the Bank, whether known to it or not, and whether its officer covered up and concealed them or not. The judgment, therefore, is for the whole amount against Lesperance, and for \$1,400 only against the Company, jointly and severally with him, and with costs.

Geoffrion & Co. for plaintiff.

Mousseau & Co. for Lesperance.

J. C. Hatton for Canada Guarantee Co.

SUPERIOR COURT.

MONTREAL, April 29, 1881.

Before JOHNSON, J.

MORRISON *es qual.* v. McCUAIG.

Trustees—Right of Survivor.

Certain property was acquired by a number of trustees for the congregation of a church. No right of survivorship was referred to in the deed of conveyance.

Held, that a person claiming to be sole surviving and remaining trustee had no right of action to get back the property from alleged unlawful holders.

PER CURIAM. The plaintiff and defendant were, both of them, co-trustees along with others of a Presbyterian Church, and in that capacity, and before the passing of the statute of 1875, they, all of them, acquired some land for the congregation and built a church. Soon afterwards proceedings took place in consequence of the provisions of the statute, and one party contends that there has been a lawful secession, and the other that there has not. The plaintiff belongs to the Union party, and the defendant to the Anti-Union; and the plaintiff brings the action to get back the church and land, alleging the defendant's individual and unlawful possession of them.

The plaintiff styles himself "John Morrison, of Cote des Anges, in the County of Soulanges,

"District of Montreal, farmer, in his quality of sole surviving and remaining trustee legally appointed and authorized to hold the real estate, and representing the civil rights of the religious congregation of Cote St. George, in the said county, in connection or communion with, and forming part of the Presbyterian Church in Canada, suing in his said quality, and on behalf of all the other members of the said congregation." These are the important capacities assumed by the plaintiff, and he brings his action against the defendant personally, describing him merely as, "Donald McCuaig, of Cote St. Patrick, in the County of Soulanges, in the District of Montreal, farmer."

Of course, the real object of the action is to have it decided to which party the church rightfully belongs, but the defendant by his first plea contends that the plaintiff has no quality to bring the action at all; and that he, the defendant, has no quality to defend it. With respect to the plaintiff's right, it is questioned on two grounds: one of law and the other of fact; first, it is said he would not by law represent the civil rights of the congregation as the surviving trustee; and secondly, as matter of fact, that there was another body of trustees elected, and who would have had the right of action if any existed. Now, without going into the question of fact at all, even with regard to this preliminary question of procedure, and still less on the merits, it seems that the right of property in this building and in the land, was conveyed by the deed of the 23rd November, 1871. It was there conveyed to William McNaughton, John Morrison (the present plaintiff), Duncan McClellan and Donald McCuaig (the defendant), "en leurs qualités de Syndics de la congrégation Presbytérienne en connection avec l'église d'Ecosse des dites Cotes St. Georges, St. Patrice, partie du Township de Newton attachés, et qui font et feront profession à l'avenir de la dite religion Presbytérienne." Then follows the description of the land conveyed. There is no right of survivorship here mentioned at all. The conveyance seems to be to these gentlemen as trustees, and the right of action would seem, so far, to be vested in them and their successors in office.

The deed further goes on to say: "Pour le dit terrain et dépendances jouir, user, faire et disposer en toute propriété par la susdite congrégation Presbytérienne, &c." Whether the right of action therefore would be in the congregation, or in the trustees, is another question altogether, and it was to that point merely that I understood the argument of the learned counsel for the defendant to be directed; and there certainly was much force in his argument that, if the property was vested in them as a corporation, there was no right of action through another or others, under Art. 19 of the Code of Procedure. But the point now is different from that: It is, whether the deed, not having provided for the succession of the trust, and the

constitution of the church not being shown to have provided for it, a single survivor can, by mere right of survivorship and without any successors having been chosen, exercise the right in his own name. This is the plaintiff's own statement of his case, quite irrespective of the delendant's pretension, which he contests, that other trustees were actually appointed and are *de facto* in office: so that this naked point is at once presented, and must be decided; can one of a number of trustees acquiring property for a congregation, by mere right of survivorship, and without any due succession to those who have died or ceased to hold office, exercise the rights of the whole body of trustees in his own person and name? Nay, more, perhaps: can the plaintiff call himself survivor at all, for he is naturally so only as regards the two of the trustees who have died; the other one has gone over to the other camp, and is still in the land of the living. Now this point was not argued at all, and I must decide it for myself. Either this congregation was a corporation or it was not. If it was a corporation, it must sue in its own name. If not being a corporation, the congregation has civil rights exercisable by trustees, those trustees and their duly appointed successors must sue. The old Statutes, long before the Act of 1875, regulate this. They are the 2nd Vic., c. 26, and the 19th and 20th Vic., c. 103, and they are reproduced in the Consolidated Statutes of Lower Canada, cap. 19. The first of these Acts, sec. 3, said that congregations, when they wished to acquire lands for churches, might "appoint one or more trustees, to whom and to whose successors (to be appointed in the manner set forth in the deed of conveyance) the lands necessary for each of the purposes aforesaid may be conveyed; and such trustees and their successors for ever, by the name by which they and the congregation for which they act are designated in such deed, may acquire, &c., and may institute and defend all actions at law, &c., &c." By the second of these Statutes, sections 1 and 3, "the successors of the trustees appointed in the manner provided by the deed, or in the manner provided by a meeting of the congregation held as provided by that Act, have the same powers." This deed, as we have seen, makes no provision on this subject. If the plaintiff's position is to prevail, the mere fact of his own decease, or of his going over to the other party, would have extinguished the action forever. Therefore, I need not go farther; and without discussing the facts alleged, either as regards other *de facto* trustees, and without getting to the point of the defendant being improperly sued in his individual capacity, and still less to the merits of the case, I hold that I cannot proceed further with it, and it is dismissed with costs.

A case of *McRae v. McLeod*, very like this one, was cited by the plaintiff. That case was decided in Ontario, and was very like the present one, three surviving trustees having

brought the action, and no point of this sort seems to have been raised. I am not informed what the law of Ontario may be respecting the acquisition of lands by religious congregations; but our Statutes which I have quoted, are, I think, clear.

J. L. Morris for plaintiff.

Doutre & Co. for defendant.

NOTE.—In *Tavernier v. Robert et al.* (p. 131), *Prefontaine & Major* were also for defendants, by substitution of attorney.

THE BAR SECRETARYSHIP.

To the Editor of the Legal News:

DEAR SIR,—Since you were good enough to publish my declaration of battle a few days ago, hear, I pray thee, my *post item* wail. Put not your trust in promises. Two years ago my claim, or at least the claim of some English speaking candidate to the Secretaryship, was admitted on all sides. No such phenomenon as an English speaking secretary had been heard of for many years. Almost all the leading French barristers (I might mention names, but *cui bono*?) pledged themselves that as soon as Mr. Pelletier (who had then been a candidate for two or three years) should have had his turn, they would consider me next entitled to the position. On this ground, and on this alone, I was tempted to come forward this year. But in the meantime, other competitors had entered the field. They did so, if I am rightly informed, *in forma pauperis*. Their appeal was *ad misericordiam*, and was characteristically importunate. One was a poor man with a large family, or a large man with a poor family (I forget which). He gained the coveted prize, and is (presumably) happy. *Gaudeamus igitur*. I who was deluded into the belief that I was the only one who had any claim got *five* votes. In justice to my friends, however, I must state that business engagements prevented me from being present at the fray, and they were therefore quite justified in thinking that I had retired from the lists. I arrived just in time to hear the "demonition total," as Mr. Mantalini puts it. Therefore I complain not. But there seems to me to exist a moral in all this. If the rich pecuniary reward attached to the office of secretary is to prove only a golden apple of discord among the younger members, why not abolish it altogether? It is evident that the choice will be restricted so long as that remains. If the office should go begging under these conditions, as well hap it may, I will pledge myself (if I may be permitted to pledge myself to anything so far in the future) to perform the duties of the office until another can be found to do so on the same terms. By this means \$200 can be added annually to the library fund, and much contention avoided.

I remain again,

Truly yours,

C. H. STEPHENS.

Montreal, May 3, 1881.

The Legal News.

VOL. IV.

MAY 14, 1881.

No. 20.

REGULATION OF PUBLIC HOUSES.

In the case of *Blouin v. The Corporation of the City of Quebec*, (7 Q.L.B. 18,) the question came up, whether the local legislature has authority to control and restrict the hours during which houses in which spirituous liquors are sold, may remain open. The plaintiff sued for the recovery of sums of money which he had paid to the Corporation, as penalties for keeping his house open within prohibited hours. The judgment of the Superior Court was rendered by Chief Justice Meredith, who stated that he was clearly of opinion that "the provisions of the Quebec statute requiring houses where spirituous liquors are sold to be closed on Sunday, and for certain parts of the night, are nothing more nor less than police regulations, and as such completely within the power of the provincial legislatures." Reference was made by the learned Chief Justice to a judgment delivered by Mr. Justice Stuart at Quebec, in a case of *Collepy v. The Corporation of Quebec* (not reported,) in which that judge "expressly said that he regarded the provisions of the law, as to the closing of taverns on Sunday, and during the night, as mere police regulations; and therefore within the power of the provincial legislatures." The decision of the Supreme Court in *City of Fredericton v. The Queen* (3 S.C. Rep. 505) was considered. In this case it was held that under sub. sec. 2 of sec. 91, B.N.A. Act, 1867, "regulation of trade and commerce," the Parliament of Canada alone has the power of prohibiting the traffic in intoxicating liquors in the Dominion or in any part of it. But Chief Justice Meredith held that although the Parliament of Canada, under its power to regulate trade and commerce, alone has the power to prohibit the traffic in intoxicating liquors, yet that the provincial legislatures under the powers given to them, may for the preservation of good order in the municipalities specially under their control, make reasonable

police regulations, although such regulations to some extent affect the sale of spirituous liquors, provided they do not improperly interfere with trade and commerce. A decision somewhat similar in principle was given by the Court of Appeal in *Bennett v. The Pharmaceutical Association* (4 L.N. 125) in which Chief Justice Dorion cited the judgment of the Privy Council in *Cushing & Dupuy*, 3 L.N. 171.

LEGISLATION AT QUEBEC.

Among the bills introduced during the present session at Quebec, is one by Mr. Irvine to amend the law of evidence in civil matters. This bill provides that in all non-appealable cases in the Circuit Court, and in all cases in the Superior Court in which the trial is had before a jury, or is fixed for proof and hearing at the same time, the parties to the issue may be examined as witnesses on their own behalf and shall be subject to cross examination and amenable to all the rules which govern the examination of other witnesses, notwithstanding articles 1232 of the Civil Code and 251 of the Code of Civil Procedure to the contrary.

Mr. Irvine has also proposed a measure to secure more effectually the attendance of witnesses. The bill provides:—1. The first paragraph or section of article 249, C.C.P., is repealed, and the following is substituted in its stead:—249. At the time a witness is served with a subpoena a sufficient sum must be tendered to him for travelling expenses, at the rate usually allowed by the court of his domicile, and he may, moreover, before being sworn at the place and time appointed, require immediate payment of the amount or balance due to him for his taxation as such witness, which amount of taxation shall, in that case, be then and there taxed by the judge or prothonotary. And any witness, duly summoned, who without sufficient cause, fails to attend at the place and time appointed, in obedience to the subpoena, may, on summary application made to the court, or to the judge, on an affidavit that to the best of deponent's knowledge and belief the said witness is material and necessary, and without further notice, be arrested on a warrant issued for that purpose, and brought before the said court or judge, and, if the cause of his failure to attend be considered insufficient, he shall be

immediately condemned to a fine not exceeding forty dollars, to be recovered for the use of the Crown, and to the costs of the said application, arrest and proceedings connected therewith, for the use of the party summoning such witness, independently of any recourse the party who summoned him may have for damages caused by such default; and, in the event of the said fine and costs not being paid immediately, or within such time as the court or judge may fix, the said fine and costs are recovered at the instance of the party summoning, and for the uses aforesaid, in the same manner as any other sum awarded by judgment; and the court or judge may, moreover, imprison the said witness for contempt, if it lies; and every writ of subpoena must contain in the body thereof the following additional words: "and you are hereby notified that if you make default to appear you may be proceeded against in conformity with the provisions of article 249 of the Code of Civil Procedure, as amended."

Another measure brought forward by the same gentleman is intended to make better provision for the recovery of debts. This bill provides: When any creditor has recovered judgment against his debtor, and said judgment remains unsatisfied for a period of fifteen days from the date of the said judgment, any judge of the Superior Court may on summary petition of the plaintiff order any enquiry respecting the property of the said judgment debtor, and on such order being made, the said plaintiff may proceed to examine, in the ordinary way in which evidence is taken, but on any day, whether during term, enquete days or other juridical day, the defendant himself or any other witness, respecting the property of the said defendant, and generally, thereby, to obtain any evidence which may enable him with more facility to enforce the payment of his debt. If it shall appear by such enquiry that the property of such defendant is insufficient for the payment of his debts, the judge may order that all his property shall be sold in virtue of the writ of execution to be issued in such cause, provided that the amount of the said writ is at least \$200 and that his creditors be called in according to law, and their claims be produced in conformity with article 604 C. C. P.

It is to be regretted that copies of these and other important bills have not yet been distributed.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, March 31, 1881.

Before SICOTTE, J.

BANK OF AMERICA V. COPLAND et al.

Insolvent Act of 1875, Sec. 61—Promissory note payable in a foreign country—Protest.

In order to be discharged under the Insolvent Act of 1875, from a debt represented by a note, of which the holder is unknown, the insolvent must insert the particulars of such note in his statement.

In the absence of the affidavit required by C. C. P. 145, the irregularity of the protest cannot be urged.

When a note is made payable in a foreign country, the law of that country governs as to the time of protesting and days of grace.

The action was on a promissory note for \$2,400, made in Montreal, and payable in the State of New York.

SICOTTE, J. Two questions are involved in the pleadings, and they are of some importance. The first concerns the maker of the note sued on, E. M. Copland, who filed a separate plea from the other defendant, the endorser. He pleads that he was put into compulsory liquidation, and that the note sued on was given to Parker & Co.; that he gave a list of his creditors, including Parker & Co. nominatively; that the latter filed their claim, in which said note was mentioned. Defendant pleads further that he has obtained a discharge in conformity with the Insolvent Act, and, therefore, that he is free from all liabilities existing against him and provable against his estate.

The evidence establishes that the note was signed by E. M. Copland, payable to his order, and being endorsed, was delivered to the other defendant, C. Copland, who endorsed it; that the note was from that time in the possession of the plaintiff, who received it in payment of a larger debt from Parker & Co. The latter did not endorse the note. When defendant filed his *bilan* he knew that the note was so made that it could pass from hand to hand without being indorsed. It follows that the holder of the note would hardly be known by the insolvent after some years, unless he was directly informed. By Section 61 of the Insolvency Act

it is enacted that "if the holder of any negotiable paper is unknown to the insolvent, the insertion of the particulars of such paper in the statement of his affairs, with the declaration that the holder thereof is unknown to him, shall bring the debt represented by such paper, and the holder thereof, within the operation of the Act."

It may be said that the insolvent had no interest to not insert in his *bilan* the declaration in question, as plaintiff would not have much better opportunity of receiving information of the insolvency. But the Act requiring such a declaration, to make the act of insolvency operative against the holder, the Court has no discretion, when the disposition is clear and imperative, and when the fact of the omission is equally certain. The intent and the enactments of the Insolvency Act are not to be defeated by contrivances to surprise creditors. In some cases the fact complained may appear susceptible of incertitude and of contradiction. In the doubt, who is to be preferred? the creditor or the debtor? In ordinary civil litigation the doubt is favorable to the party against whom the claim is made, on the principle that it would be greater injustice to deprive one of his property without the positive certainty that he owes the debt, than to dismiss a claimant who makes but a doubtful case.

On this question of discharge it is the insolvent who is plaintiff, claiming to be liberated from a just debt because he is unable to pay. The creditor's claim is admitted; but by the law, he may be forced to relinquish all his rights, if his debtor has fully executed the prescriptions of the special law enacted for a certain class of debtors. In such circumstances the creditor is preferred to the debtor, as to the strict compliance with all the safeguards prescribed for fair play. Everything required to give him knowledge of the proceedings in insolvency must have been done. In this case no declaration, as to unknown holders of notes in the *bilan*, or notice by mail to the creditor, was made or given. By want of notice the creditor was not put in a condition to prove his claim. As a principle, the right of the creditor to prove his debt, and of the debtor to be discharged, is co-extensive and commensurate. Statutes giving summary remedy, out of the ordinary course of

the civil law, must be followed strictly. Upon this point the following facts must be noted. As proved by C. Copland, witness of defendant, the exhibit No. 4 of the latter, containing statement of notes due to Tucker & Co., does not emanate from Parker, but is only a copy of the books of E. M. Copland. This witness proves further that Parker & Co. filed no claim against the estate; he states also that the note in question and other notes given went into other people's hands, but that Parker kept the old notes given for the same debt reduced by agreement to the amount stated in these new notes, which went into other people's hands. The same witness testifies that his son E. M. Copland, must have seen the protest and notice sent on the part of plaintiff, for non-payment of the note. There is proof then, that the insolvent knew that the note was in other people's hands, and in the possession of plaintiff. It is also proved that no notice of the presentation of the petition for a discharge was given to plaintiff as required by the Insolvency Act. From these facts and the law, it must be decided that the debtor not having declared in his *bilan* that holders of certain notes of his were unknown to him, and not having given notice, as prescribed, to plaintiff, of the petition for discharge, cannot invoke such discharge against such creditor.

The second point is the liability of the endorser. At the hearing, the objection urged was that no protest and notice had been made and given, as required, and *paranti*, that the endorser was not liable for the payment. In reading the plea, I found no allusion even to this want or irregularity of protest and notice. The plea alleges simply that the defendant, C. Copland, owed nothing to plaintiff, and that he was not bound in law or in fact to pay the sum claimed; that plaintiff was the *prête-nom* of Parker & Co.; that plaintiff had acquired no right against him. No objection was taken as to the omission of affidavit concerning the irregularity or want of protest or notice in the general answer to the plea. But it may be well to examine the point so argued. The Art. 145 C. P. enacts positively that in such cases an affidavit must be made, that the protest, or the notice or notification required has not been regularly made, and how it is irregular. It has been often decided that this objection and want or

irregularity of protest or notice, must be specially pleaded and be supported by an affidavit. However, there is full proof that the protest was made and notice duly given, as appears by the evidence taken on the *commission rogatoire*, and by the protest filed before the Commissioner, and by the testimony of the indorser himself. But it was urged that the note was protested on the 3rd March, and that the last day of grace was the 4th, that by our law the note must be and ought to have been presented and protested on that last day. It was also urged that our law concerning this point ought to prevail, as the note was made in Canada. The rule, *locus regit actum*, properly carried out in all its bearings, will give a solution covering all interests with the same guarantees, but otherwise than pretended by defendant. As the note was made in Canada, everything concerning the mode or modality of the note itself must be governed by the law of Canada—*locus regit actum*. But if the payment is to be made in a foreign country, everything concerning the payment and the mode of securing it, must be made according to the law of the country where the note is payable. *Locus regit actum*. In the commentaries by Victor Fons upon legal maxims, we read the following lines:—"Les formalités probantes sont celles qui ont pour objet de constater le contrat, d'en faire la preuve écrite. C'est à cela que s'applique la maxime, *Locus regit actum*. Cela découle du principe adopté aujourd'hui par l'usage général, que la forme des actes est réglée par la loi du lieu dans lequel ils sont faits." Story, Conflict of Laws, No. 316, writes: "Nor is it any departure from the rule, that the law of the place of payment is to govern, to hold that the time when the payment of the bill is to accrue, is to be according to the law of the place where the bill is payable, so that the days of grace, if any, are to be allowed according to the law or custom where the bill is to be accepted or paid; for such is the appropriate construction of the contract, according to the rules of law, and the presumed intention of the parties." "Acceptances are deemed contracts of acceptance in the place where they are made and where they are to be performed." No. 361: "The rule as to the period of indulgence, called days of grace, is that the usage of the place in which the bill is drawn and where the payment of bill or note

is to be made, governs as to the number of days of grace to be allowed thereon."

The last day of grace for the maturity of the note in question was falling on a Sunday; the note was presented and protested on the Saturday. These performances done in the foreign country concerning the protest and notice are presumed to have been done according to the law of the land, unless impugned by affidavit, as required by Art. 145. Further, there is proof that everything was done according to the law of the State of New York, except as to the protest having been made on the Saturday. No question was put to the witnesses on this particular fact. As proof of the foreign law upon this point, plaintiff has cited Story on Promissory Notes (6 Ed., No. 220). "By the laws and custom of the United States, when the last day of grace falls on a Sunday, the note or bill must be presented for payment and protested for non-payment on the preceding day." Other authorities could have been cited to the same effect, and I will only cite one from the Commentaries of Chancellor Kent, 3, page 102: "If the third day of grace falls on Sunday, the demand must be made on the day preceding. The usage is settled in commercial matters, that if payment falls on a Sunday, payment is to be made on Saturday." If the affidavit required by Art. 145 had been made, more positive evidence would perhaps have been necessitated than that offered, to explain the special law of the foreign country. The plaintiffs have proved their case, and the defendants have not justified their pleas. Judgment for plaintiffs.

Dunlop & Lyman for plaintiffs.

Roy & Boutillier for defendants.

SUPERIOR COURT.

MONTREAL, November 30, 1880.

Before JOHNSON, J.

CITY OF MONTREAL V. TRACY.

Assessment—Mode of questioning legality—"Necessary" and "Advisable."

Work was authorized to be done by the Corporation upon a report being made by the Road Committee that it was "necessary." Held, that a report that it was "advisable" was sufficient.

PER CURIAM. The defendant is sued in the

present case for \$130, the amount of his contribution or share in the construction of a drain in McCord street, under the authority of a resolution of the Council of the 26th September, 1867. The defendant assumes to answer this demand by setting up the irregularity, as he calls it, of the resolution, which he says is null and void, without, however, giving any reason why; and then he adds, by another plea, that there was a good drain before, and the Corporation had no right to make another one, or to levy an assessment for that purpose; that the lowest tender was not accepted; and that the assessment roll is null and void. There is a replication, and a general answer in fact and in law; and the first point, therefore, would be whether this plea is good in law, which I should say it is not: for if a party can incidentally, in any case where he is asked to pay his share of an assessment, raise the question of the legality of the by-law, or the resolution, or the assessment; or even go so far as has been done in this plea, and raise the question of the utility of the work and the mode of giving the contracts, after the assessment has become executory, from not being questioned in a regular manner, it is quite obvious that civic government becomes simply impossible. I shall not now go into this, however, because nothing was said about it in argument; and because on the only points of fact as to which any irregularity is pretended the defendant's case utterly fails.

There was, however, a pretension that the powers given plainly by the 12th paragraph of the 58th section of chapter 128 of the 14 and 15 Vic. to pass the by-law which authorizes the resolution in question, were exercised irregularly, because the statute and the by-law under which this assessment was made, gave power to make it whenever the Road Committee should judge it to be "necessary;" whereas, in the present case, the Road Committee had only reported to the Council that it was "advisable." But the Council seems to have thought, reasonably enough, that if their committee thought it advisable, it was probably necessary. See Dillon 1, 178. Judgment for the amount demanded, less \$4 by retraction.

R. Roy, Q.C., for plaintiffs.

Doutre & Co. for defendant.

RECENT DECISIONS AT QUEBEC.

Account—Demurrer.—The plaintiff brought suit against defendant, alleging a purchase by them jointly of certain promissory notes and securities which the defendant collected for their common profit, the plaintiff's share, acknowledged by the defendant, being a definite and ascertained sum of \$713.75. The plaintiff added the common assumpsit counts, and prayed for an account in the usual form, with vouchers, and that in default the defendant should be condemned to pay the said sum of \$713.75. *Held*, on demurrer, that the demand for an account was not warranted by the allegations of the declaration, and was not the proper remedy for the cause of complaint therein stated.—*Michaud v. Vezina*, (Q.B.), 6 Q.L.R. 353.

School Taxes.—The Circuit Court has exclusive jurisdiction in all suits for school taxes, whatever may be the amount of such suits, and whether the actions be hypothecary or personal only.—*Les Commissaires d'Ecole de Sillery v. Gingras et al.*, (Court of Review), 6 Q.L.R. 355.

Master and Servant.—An employer cannot, of his own mere will, cancel or terminate a contract for personal service for a fixed period. And where, in connection with the contract of personal service, the employee had a lease of premises from his employer, it was held that the termination of the former contract by the employer without cause and without due notice, could not serve as the basis of an action to rescind the lease.—*Reid et al. v. Smith*, (C.R.), 6 Q.L.R. 367.

School Commissioners.—La fabrique qui contribue annuellement \$50 au soutien d'une école sous la direction des commissaires d'écoles, acquiert par là le droit au curé et au marguillier en charge d'être commissaires, et l'allégation de l'acte, par lequel la fabrique s'est obligée à contribuer une plus forte somme pour une école, et de sa qualité de marguillier en charge, est une réponse légale à la requête qui accuse ce dernier d'exercer illégalement la charge de commissaire.—*Charest v. Veilleux*, (S.C.), 6 Q.L.R. 375.

Congé-Défaut.—1. Un congé-défaut ne peut être obtenu par le défendeur qu'en rapportant sa copie du bref et de l'action le jour du retour.—*Cherrier v. Torcapel*, (C.C.), 6 Q.L.R. 377. [Vide *Siegert v. Harlan*, 3 L.N. 347.]

2. Le défendeur, en faisant motion pour congé-défaut, doit en produisant la copie de l'assignation payer l'entrée de l'action.—*Coady v. Fraser*, (S.C.), 6 Q.L.R. 384.

Immoveable—Execution—C.C.P. 1102.—In a suit for \$45, dismissed with costs taxed in favor of defendant at a sum exceeding \$40, a writ of *fieri facias de terris* may issue from the non-appellable side of the Circuit Court against the plaintiff's lands to satisfy the defendant's costs.—*Moore v. Keane et al.*, (C.R.) 6 Q.L.R. 378.

Saisie-Gagerie.—Dans une saisie-gagerie par droit de suite pour loyer non échu, la saisie doit être, le nouveau locateur étant mis en cause, déclarée tenante jusqu'à la fin du premier bail, si la défenderesse ne paie pas plus tôt le montant du loyer, ou si le bail n'est pas résilié ou résolu auparavant, et la défenderesse doit être condamnée à payer les dépens.—*Sans façon v. Boucher et al.*, (C.C.) 6 Q.L.R. 384.

Mayor of Local Council.—Le maire d'un conseil local n'a le droit de voter durant les sessions qu'il préside en cette qualité que lorsqu'il y a égalité des votes.—*Lemieux v. Cantin*, (C.C.) 7 Q.L.R. 16.

Local Legislature.—The provision of the Provincial Statute, 38 Vict., ch. 74, s. 4. ordering houses in which spirituous liquors are sold, to be closed on Sundays, and on every day from 11 of the clock at night until 5 of the clock in the morning, is a police regulation, within the power of the Provincial Legislature.—*Blouin v. Corporation of the City of Quebec*, (S.C.) 7 Q.L.R. 18.

THE LATE CHIEF JUSTICE DUVAL.

Mr. Duval, for ten years Chief Justice of the Court of Queen's Bench in this Province, died on Friday, the 6th inst. The following notice written by "Un ancien Avocat," which appears in *La Minerve*, furnishes an interesting sketch of the life of the deceased and of the times in which he played an active part.

Le juge Duval était le dernier anneau de la chaîne qui unissait le barreau de Montréal à celui de Québec, un des derniers représentants des traditions juridiques d'une autre époque, et, avec le juge Badgley et le digne doyen de la

faculté de droit de l'Université Laval, M. Cherrier, un des derniers avocats admis au barreau pendant le premier quart de ce siècle. Sous ces différents aspects, sa mort a revêtu le caractère d'une perte nationale.

Jean François Joseph Duval est né à Québec le 18 juillet 1801, et était ainsi à sa mort âgé de près de quatre-vingt ans. Son père, François Duval, appartenant au régiment royal des volontaires canadiens, avait épousé, au fort de Chambly, où il était en garnison, Ann Germaine, la fille d'un militaire anglais, dont il eut deux enfants, le sujet de cette notice et Ann Duval, qui épousa plus tard le juge Polette et qui est morte aux Trois-Rivières il y a plus de vingt-cinq ans.

Eloigné par une infirmité précoce des jeux de son âge, le jeune Duval eut une enfance sérieuse et retirée.

Aussitôt qu'il eut appris à lire, les livres devinrent ses seuls compagnons et son unique amusement. Ce fut sans doute dans cette existence souffrante qu'il puisa, de bonne heure, cet amour passionné de l'étude qui ne l'abandonna jamais et qui le suivit jusqu'à la tombe.

Presque constamment cloué dans sa chambre, par ses infirmités croissantes, depuis sa retraite de la magistrature, il y consacra les sept dernières années de sa vie, aux sciences, aux lettres et à la philosophie. Il a passé une partie de l'hiver dernier à l'étude de la chimie, et la dernière fois que l'auteur de cette notice lui rendit visite, peu de temps avant sa mort, il le trouva occupé à la lecture, dans le texte grec, d'un ouvrage de Platon. Peu de personnes peuvent affirmer qu'en entrant chez lui, elles l'aient trouvé autrement qu'un livre à la main. Le besoin des occupations intellectuelles exerçait chez lui l'empire d'une nécessité, et sous ce rapport, il était diligent, comme d'autres sont paresseux, avec délice.

• •

Sa première éducation fut une éducation anglaise. Son père était ce que l'on appelait un Canadien anglicisé, et sa mère étant une anglaise, on devait naturellement parler anglais dans la famille. Cette circonstance explique pourquoi, au lieu d'être envoyé dans un collège français, comme la plupart des Canadiens de son temps, pour y faire un cours classique, il fut mis à l'Académie du Dr. Wilkie, professeur d'une

grande distinction, qui fut le fondateur du *High School*, et que fréquentaient ses contemporains d'origine anglaise.

Comme il est bien rare qu'un homme soit versé à égal degré dans deux langues, et que la première apprise rejette toujours à l'arrière place la seconde, M. Duval qui, au dire des connaisseurs, possédait avec une grande perfection la langue anglaise, n'était pas également versé dans la langue française. Non que sa connaissance du français fût défectueuse,—il en avait au contraire une connaissance complète,—mais il parlait mieux et de préférence l'anglais, qu'aux yeux d'un étranger, eût passé pour sa langue maternelle.

Quand il était au barreau, il plaidait en anglais, et sur le banc, il prenait avec empressement occasion de la circonstance qu'une cause avait été plaidée des deux côtés, ou d'un seul côté, en anglais, pour prononcer son jugement en cette langue.

Ecrivait-il avec la même facilité qu'il les parlait, l'une et l'autre langue? La chose est difficile à dire; car, en dehors du domaine judiciaire, nous n'avons de lui, que je sache, aucun écrit remarquable, et sur le banc il disait plutôt qu'il ne lisait ses opinions qu'il n'écrivait jamais, *in extenso*. Ce qui sert, en dehors d'autres motifs, à expliquer la maigreur des rapports judiciaires à l'endroit de ses opinions.

A l'école de M. Wilkie, où il eût pour condisciples les juges William King, John Samuel McCord et Aylwin, le jeune Duval se montra ce qu'il devait être plus tard au barreau, en société, et un peu sur le banc: railleur, frondeur et taquin. Comme tous les enfants malingres, qui profitent de leur faiblesse pour faire toutes sortes de niches à leurs camarades plus forts et plus ingambes, le jeune Duval, au dire de ses condisciples, se plaisait à accabler de railleries, de tours et d'avanies ses camarades plus ou moins âgés que lui. Dans les circonstances ordinaires, mal lui en serait advenu, mais il avait trouvé dans son ami, William King McCord, qui s'était pris d'affection pour lui, un défenseur robuste dont la stature puissante faisait rentrer la colère des élèves bernés et sauvait de la vengeance de leurs coups, leur malin persécuteur. "*From many lickings I have saved you at school,*" lui disait un jour son ancien ami en ma présence. Et

l'autre a répondu par un jeu de figure venant en droite ligne de l'école du Dr. Wilkie!

Sous le rapport intellectuel, John Duval, c'est ainsi qu'on l'appelait dans sa famille, révéla également les aptitudes qui devaient en faire l'homme distingué que nous avons connu, et lui ouvrir la brillante carrière qu'il a parcourue. Une intelligence précoce, un talent d'une grande supériorité et une vaste mémoire en firent bientôt un des meilleurs élèves de l'Académie, d'où il sortit, après y avoir fait un cours classique, aussi brillant que solide, pour entrer en cléricature.

A l'école de M. Wilkie, John Duval avait cependant un rival qui, en bien et en mal, ne lui en cédait guère, et qui, sous aucun des rapports que je viens de signaler, n'était homme à se laisser rendre des points par personne. Cet élève qui a, aussi lui, fourni une carrière distinguée au barreau, en politique et dans la magistrature, était le juge Thomas Cushing Aylwin, ou plutôt, comme on l'appelait alors tout court, Tom Aylwin. Si celui-là n'a pas ravi à l'autre la palme du succès et de la taquinerie, il l'a bien partagée avec lui. A tout événement, la chronique québécoise disait, quand il y a vingt-cinq ans, on parlait encore des choses de cette époque déjà éloignées, que Duval et Aylwin étaient restés dans les souvenirs de cette école —qui était encore bien chère à la population anglaise—les deux élèves les plus remarquables de leur temps.

• •

M. Duval commença d'abord sa cléricature sous M. Van Felson, avocat distingué du temps, —qui fut nommé juge à Montréal, en Décembre 1849, en vertu de la loi de judicature de 1848, faite par M. Lafontaine, et qui y est mort quelques années plus tard—et la termina sous le juge en chef Vallières de Saint-Réal, avec lequel il entra en société en 1823, lors de son admission au barreau. Un incident assez curieux que j'ai entendu le juge Vallières lui-même raconter, le plus plaisamment du monde, fut la cause de leur séparation.

La dissolution précoce d'une société entre un vieil et un jeune avocat, est d'ordinaire préjudiciable au dernier, mais il n'en fut pas ainsi pour M. Duval, dont le talent déjà populaire, l'amour du travail et l'assiduité lui assurèrent bientôt une grande clientèle.

Sa carrière professionnelle s'ouvrit donc en 1823, pour ne se fermer, sauf un court intervalle de suspension lors de sa nomination comme juge assistant à la Cour du Banc de la Reine, qu'en 1849, époque où il fut appelé à la Cour Supérieure à Québec, en même temps que M. Van Felson fut, comme nous venons de le dire, nommé à Montréal. Le juge en chef Meredith fut en même temps nommé juge à Québec, à sa propre demande, et non à Montréal, à raison des incompétences que pouvait susciter la grande clientèle dont il avait joui à Montréal. Tous deux devaient se rejoindre plus tard sur le banc de la Cour d'Appel, après avoir siégé ensemble à Québec.

Le barreau de Québec était à cette époque le premier barreau de la province; il était sans contredit supérieur à celui de Montréal. Un grand nombre d'avocats dont le nom est resté célèbre dans le pays, non-seulement dans la carrière du barreau, mais dans la politique, y avaient atteint l'apogée de leur réputation. Les noms de Plamondon; Vallières, les deux Stuart (James et Andrew), Moquin et Bédard, y brillaient de tout leur éclat. Mais cette pleiade d'avocats distingués qui, depuis vingt ans, tenaient le sceptre de l'éloquence du palais, devait bientôt se disperser, les uns par leur élévation à la magistrature, les autres par la mort, et le reste pour d'autres causes. La gloire du barreau de Québec ne devait pas cependant s'éclipser pour cela; leurs successeurs étaient trouvés, Aylwin, Duval, Black, Caron, Baequet étaient là pour recueillir leur héritage et perpétuer les traditions de leurs prédécesseurs.

• •

L'avocat de ce temps-là n'était pas l'avocat d'aujourd'hui. L'homme de loi était *avant tout* un homme d'esprit. Un procès n'était pas une affaire, mais toute affaire devenait un procès, c'est-à-dire une plaidoirie que la ville venait écouter; et l'audience était un théâtre, où la campagne avait aussi siège au parterre. Tels procès sont restés historiques à Québec, qui, instruits aujourd'hui à Montréal, auraient à peine leur place dans les journaux, parmi les faits divers.

C'est dans ces joutes oratoires, que Vallières et Plamondon avaient fait leurs armes et gagné leur titre d'avocats éloquents, et celui d'hommes les plus spirituels de Québec; titre que valait

alors, dans l'ancienne capitale, ce que vaut aujourd'hui le titre de ministre.

Combien de positions difficiles un mot d'esprit n'avait-il pas remportées, et que de succès obtenus par une prompte répartie! Vallières, assis à la table des Conseils du Roi, causant avec un confrère, est trop occupé à vilipender les juges, pour s'apercevoir de l'entrée de la cour qui l'écoute et oublie d'ouvrir l'audience. Il relève la tête et l'un des juges lui dit: "M. Vallières, nous avons tout entendu." Un moment déconcerté, Vallières recouvre cependant son sangfroid, et dit à voix haute: "Une chose me console, c'est que vous ne vous en vanterez pas." Et le tribunal de se joindre à l'auditoire pour acclamer le bon mot et oublier l'offense!

M. Plamondon, dit le juge Sewell, la cour admet votre principe, mais n'en est pas moins unanime à vous faire perdre votre cause. "Si la chose était égale, répond Plamondon, ne pourriez-vous pas me faire perdre le principe et gagner la cause." Et le soir toute la ville répétait le bon mot, tout comme on raconterait aujourd'hui le gain d'un avocat sur un stock acheté sur marge!

Et que d'autres bons mots et que d'autres promptes réparties!

(A continuer.)

RECENT CRIMINAL DECISIONS.

Assault—Husband and wife.—Where a husband is charged with aggravated assault upon his wife, and the facts tend to show wanton conduct on his part, it is admissible for him to show that, a short time previous thereto, he surprised his wife in undue intimacy with another man.—*Gretta v. The State*, Court of Appeals, Texas.

GENERAL NOTES.

Richard Alleyne, Esq., Q. C., has been appointed a puisné Judge of the Superior Court, in the room of Mr. Justice Baby, transferred to the Court of Queen's Bench.

The *Canadian Law Times* for May contains an essay which was written by Mr. W. A. Polette, for the B.C.L. degree, McGill Law Faculty. The subject is, "Can the Jury convict of common assault upon an indictment for murder or manslaughter?"

The Legal News.

Vol. IV.

MAY 21, 1881.

No. 21.

JUDICIAL REMUNERATION.

It was generally believed that the salaries of judges of the Superior Courts would have been re-adjusted during the recent session of Parliament, but, unfortunately, the wise counsel tendered by Lord Dufferin (see 1 Legal News, p. 469,) has not yet been heeded. We are reminded of this subject by the following letter from an English barrister, which appears in the *N. Y. Herald* of May 8th:—

ROCHESTER, N. Y., April 18, 1881.

To the Editor of the "Herald,"

The following information may interest some of your readers:—"Barbour's Supreme Court Reports" from 1847 to 1877, contain 11,616 reported cases or thereabouts. Volume 67, as those of your readers who are lawyers will know, contains a list of Barbour's cases—appealed, as affirmed, approved, modified, overruled or reversed. On totalling up this list, I find that the whole number of the above decisions appealed from is 1,020, of which number 428 cases, or nearly fifty per cent, were either reversed or overruled. Comment is needless. The "people" imagine that they are very economical in underpaying the judges, and also in not trusting them with office during life or good behavior. A blessed state of ignorance, truly! It is not too much to say that the majority of the judges are shamefully overworked, and the wonder is that they perform their duties so well. It is like as if a doctor was crowded with patients from morning to evening, and only allowed one minute to each patient and to have to work evenings as well, and yet to be expected to make miraculous cures, the patients, of course, to be allowed their privilege of grumbling all the time. It was only the other day that Judge Choate, of New York, resigned because he declined, and most properly, as I hold, to have the life's blood drained out of him for \$4,000 per annum. A man of ability owes some duty to his family after all. He cannot afford to allow himself to be killed. Again, the very idea of a man being called upon to decide cases involving thousands of dollars, upon a salary of \$4,000 a year smacks of absurdity. It is safe to say that for every dollar the people save in salaries under the present system, they pay at least five in other and roundabout ways, the uncertainty of the law being one great luxury for which they pay pretty heavily. Why a lawyer who has or who can get a fair-sized practice should ever consent to become a judge in New York State is more than I have ever been able to discover. The people of this country are fond of comparing it with monarchies and aristocracies to the disadvantage of the latter, and no doubt in many respects it may be so favorably compared; but there are two qualities in

which those "effete" systems are at present decidedly superior—namely, in giving credit for good intentions, and in generosity to public servants.

The "people" are mean and the "people" are cowardly—that is all there is in it. They are mean because while claiming and getting the utmost fraction of wages and the utmost value of products for themselves, they underpay and overwork those men of education into whose hands are necessarily committed their highest interests. And why? Because they are jealous of them—meanly jealous of them. They are cowardly because having given a trust they are afraid to trust wholly, but give a niggardly, half-hearted confidence. What sacrifice of power can the "people" possibly make in appointing them judges for life or good behavior? Let any one show one valid reason based on popular liberties for the present limitations. In case of misbehavior brought before the Legislature, can the people not cancel at any time the appointment of any judge? As regards despotism, I fail to see that it makes any difference whether the despot is personal or impersonal. The "people" or the "machine" called "the people" are here the despots, and they require slaves for their service. The boasted maxim of "Live and let live" is all very well so long as the people are on the "living" side of the contract, but when it comes to "letting live" those they employ it is quite another affair altogether.

W. H. BARLOW, Barrister-at-Law,

Middle Temple, London, England.

P.S.—The profession should do as their betters do—go in for a little trade unionism. They should strike and let all the business of the State come to a standstill for want of judges. This is a mere matter of organization.

THE LATE CHIEF JUSTICE DUVAL.

We conclude, in the present issue, the reproduction of a very interesting, and at the same time very truthful account of the late Chief Justice Duval. We regret that the author's name is not appended. The production is generally ascribed to an eminent ex-judge. We must add, from our own recollection of this important character in Canadian history, that Judge Duval, though generally correct in his appreciation of the evidence, did not always satisfy his hearers that he had read it carefully; and he was frequently undignified in his style of rendering judgment. For example, we have heard him say, "*This will teach the appellant a lesson not to rush into Court with such a case again,*" when one or more of the judges sitting by him dissented from his view of the case, and were of opinion that the appellant was well founded in his pretention.

TO CORRESPONDENTS.

We would beg our French correspondents to write to us in their own language. Although the *Legal News* is issued by English publishers, we have equal facilities for printing the contents in either language, and correspondence, articles, or other contributions, will be equally welcome, whether the manuscript be in French or English.

NEW PUBLICATION.

STEPHENS ON THE LAW AND PRACTICE OF JOINT STOCK COMPANIES.

In this work, which is issued by Carswell & Co. of Toronto, we have the first attempt, in Canada, to treat in a brief and comprehensive form the law upon the important subject of Joint Stock Companies. The author is already favourably known to the bar as the editor of a Digest of the decisions of the Province, and the present work places his reputation as a legal writer upon a more solid basis as the annotator of an extremely important text of law. The work consists mainly of a commentary on the Joint Stock Companies Act, 1877, but in connection with this Act, the author has collated all the decisions, English and United States, as well as Canadian, which bear upon the subject. The work is preceded by an introduction which is alike interesting and instructive, presenting an admirable view of the law relating to associations in the Roman and modern systems. Mr. Stephens has treated the theme in a manner which will be appreciated by readers who desire to obtain in brief compass a lucid statement of the development of the law on this subject. He has also shown great industry and thoroughness in his examination of decided cases, English and American, as well as Canadian. The work will add greatly to his reputation as a legal writer, and should find a place in every Canadian law library. The book is admirably printed and bound. We regret only that the proof-reading has not been more carefully done; such errors as "Code Civile" and "Société" offend the eye too frequently. But apart from this minor defect, which can hardly be obviated in a new country, the book is a credit to the legal profession of Canada, and we hope that the

author will meet with such encouragement as will induce him to issue new editions as occasion arises for them. In a recent issue, we published a letter from Mr. Stephens, on the subject of the Bar secretaryship. The present work shows, we think, that while he well deserves any compliment which his *confrères* have it in their power to bestow, his time has been more advantageously employed than in the duties of an office which are largely of a routine character.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, November 30, 1880.

Before JOHNSON, J.

LA COMPAGNIE DE NAVIGATION UNION V. CHRISTIN, and LEFEBVRE et al., intervening.

Incorporated Company—Liquidation—Sale of assets.

The sale of all the assets of an incorporated company, authorized by the majority of shareholders present at a meeting duly called for the purpose, held valid, where such proceeding was not prohibited by the charter of the company.

PER CURIAM. I kept this case before me under the impression that the parties were not properly before the Court; but I must now dispose of it, as I find on examination I was in error. The plaintiffs claim from the defendant \$1,448.04, balance on his subscription of \$2,000 of the stock of the Company. The defendant admits having subscribed, but says he did so under a promise from some of the directors that he might pay in soda water and other things that he manufactured. At the same time, the defendant not feeling very sure, I suppose, about such a defence as that, took an action *en garantie* against the persons who had made the promise. In that action he failed here and in appeal. So that the first plea is dropped.

After the dismissal of the action *en garantie*, the defendant put in a supplementary plea to the effect that the plaintiff's company was no longer existing, having allowed three years to elapse without availing itself of its charter, which had therefore expired; and further, that the company had dissolved by consent of its members, and there was no board of directors or any other officer. On the day of the filing of the supplementary plea an intervention by way

of *reprise d'instance* was also filed by the intervening parties, M. H. Lefebvre et al. By this intervention it is alleged that by deed executed before L. A. Desrosiers, notary, on the 27th March, 1879, the company plaintiff sold and transferred for value, to the said intervening parties, amongst other claims, the one sued for by the plaintiff in the present cause, with authority to continue the present suit against defendant, either in plaintiff's name or in the intervening parties' own name. A copy of the deed of sale was filed with the intervention.

To this intervention defendant has answered that the deed of sale or transfer filed by the intervening parties is null and illegal, as having been made when the company was no longer in existence, and in view of the liquidation of the affairs of said company; that a company can liquidate its affairs only through a curator; that the said transfer comprises all the assets of said company, which could not be sold *en bloc*; that the transfer has not been legally authorized; that all the shareholders have not concurred in the same; that the meeting at which the said transfer was authorized was illegal, and that such meeting had no right to authorize such transfer; that a certain number of shareholders have protested against said transfer, and that the same was made in fraud of the rights of the shareholders and specially of the defendant. To this answer as well as to the supplementary plea above mentioned general answers were filed. An inscription for *enquête et vérification* as well on the action as on the intervention was filed by consent of the parties. The defendant has served interrogatories *sur faits et articles* on plaintiff, and the answers thereto were duly made and filed, and the defendant has established nothing by means of these interrogatories.

It appears by the deed of sale and transfer filed, and by the copies of minutes of meetings annexed to the same, as also by the evidence of A. W. Charlebois, manager of the company plaintiff, the only witness examined in the cause, that the Union Navigation Company sold its boats in the month of May, 1876; that the transfer in question to the intervening parties was authorized at a meeting of the shareholders duly called for that purpose, and after tenders had been called for the sale of the assets of the

Company. The Court is of opinion that the non-user of the charter during three consecutive years at any one time is not applicable under the provision of the Act, 31 Vict., c. 25, sec. 52. It may be true that the Company plaintiff has been for three years without any boats, but during this same period the plaintiff availed itself of its charter for the collection of its debts and for the winding up of its affairs generally. Moreover, it is very doubtful if such a forfeiture as is claimed here has not to be declared before it takes effect. See 1st Broom & Hadley's Commentaries, pp. 586-7, Code of Civil Procedure, Arts. 1016, 1017 and 998. At all events, in the present case the sale of the assets of Company plaintiff was made to the intervening parties before the expiration of the three years, and the intervening parties are as well founded in their intervention by way of *reprise d'instance* as a curator appointed to the dissolution of the said Company. As to whether an incorporated company has the right, in virtue of a resolution passed at a meeting of its shareholders called for that purpose, to sell its assets *en bloc* it seems to be unquestionable. "On the other hand, it is to be observed that a corporation acts by a majority; the will of the majority is the will of the corporation; and whatever it is competent for the corporation to do can be done by a majority of its members against the will of the minority. It follows from this, that the power of a majority of the shareholders of a company incorporated by charter or Act of Parliament, is limited only by that charter or Act, unless those who compose the majority have restricted their powers by some special agreement." 1 Lindley on Partnership and Companies, pp. 612-613. The defendant admits having subscribed the stock, and upon his paying to the intervening parties the the validity of such a payment cannot possibly be questioned. Now, as it appears of record that since the institution of the present action, the amount claimed from defendant has been transferred to the intervening parties, it is clear that the judgment must go in favor of the latter, just as in an ordinary case of intervention by way of *reprise d'instance*.

Beique & McGoun, for plaintiffs and intervenants.

Lacoste & Co. for defendants.

SUPERIOR COURT.

MONTREAL, May 14, 1881.

Before TORRANCE, J.

MARCOUX v. RANGER dit HEART, LEROUX, opposant,
and MARCOUX, contestant.*Sale in fraud of creditors—Contestation.*

The nullity of a sale of lands in fraud of creditors may be invoked by contestation of the opposition by which the lands are claimed, though the opposition was based on a sale to opposant duly registered; and where such sale is attacked by a creditor not a party to the deed, it is not necessary to call all the parties to the deed into the cause.

The question here was as to the validity of a purchase of defendant's lands by the opposant. Marcoux obtained judgment against Ranger, on the 18th February, 1880, for the sum of \$62.40 with interest and costs, and an execution issued, under which the lands in question were seized.

Leroux claimed the lands by an opposition, alleging a sale to him by Ranger on the 16th January, 1880, duly registered. Marcoux contested the opposition, alleging fraud and concert between Ranger and Leroux to defraud the creditors, and that Ranger was, at the date of the sale, insolvent to the knowledge of Leroux and of the public.

PER CURIAM. Leroux, answering the contestation, raises the question whether his title could be attacked in an indirect way by the seizure made. He says it could only be attacked by putting the defendant into the cause.

This question has already been discussed in the case of *Kane & Racine*, (24 L. C. J. 216,) and the jurisprudence is there laid down.

The price apparently paid by Leroux, by the deed, was \$680, of which \$116.17 was said to be cash paid to Ranger by Leroux, and the balance was money due by Ranger.

It is proved before the Court, that the value of the lands was about \$1,000 or \$1,100. A lease was granted Ranger by Leroux at the same date, by which Ranger was to recover the property, on payment of the sum of \$1,360, payable in ten annual payments beginning the 1st October, 1880. It amounted to this, that Ranger would get back his property in ten years, if he paid about 20 per cent. per annum on the original price of \$680. The action was

instituted on the 28th January, 1880, a few days after the sale, but the cause of the action arose in 1877. There were about ten creditors, and the entire indebtedness of Ranger was about \$1,000, so that the property was not sold for sufficient to meet the liabilities. There was a sale of moveables which realized net, after deducting expenses, the sum of about \$143, giving each chirographary creditor about 33 cents in the dollar. If we take the evidence of Ranger and Constant, he, Leroux, knew all the creditors, and must have known the insolvency. Objection has been taken to the evidence of Constant, as interested in the result of the action, he having agreed to share in the costs of the contest. He is interested, but the objection is to his credibility and not to his admissibility as a witness. The Court must judge of his credibility, and seeing him under examination, does not reject his testimony. As to the title of Marcoux to contest, it is not in issue by the pleadings. On the whole, the conclusion of the Court is that the deed should be set aside, as made in fraud of creditors with an insolvent, to the knowledge of Leroux, the purchaser.

Archambault & David, for opposant Leroux.

Duhamel, Pagnuelo & Rainville, for plaintiff Marcoux.

SUPERIOR COURT.

MONTREAL, May 14, 1881.

Before TORRANCE, J.

DUPRAS *de qual.* v. SAUVÉ, and DUPRAS, plaintiff
en gar. v. CHAUVREAU, defendant *en gar.*

*Bail—Action against sureties under C.C.P. 828—
Bailiffs becoming sureties—C. C. 1938.*

Bailiffs who have become sureties, in violation of the Rule of Practice, No. VI, cannot plead that rule in defence to an action against them on the bond.

The action was on a bail bond given to the Sheriff and assigned by him to the plaintiff. The defendants, when they signed the bond under C. C. P. 828, were bailiffs of the Superior Court. The defendants pleaded 1o. That the bond was null, as given in violation of the Rule of Practice No. VI.; 2o That the defendant in cause No. , Felix Hercule Legendre, was deceased, to wit, on the 30th March, 1879, and they could not fulfil the bond in consequence; 3o That the proceedings in the cause against

Legendre were irregular and null, and the sureties could avail themselves of such nullities. The plaintiff called the Sheriff *en garantie* to defend her as to the first exception pleaded by the defendants invoking the nullity arising out of the 6th Rule of Practice. The Sheriff answered that by C. C. 1938, the defendants could be sureties.

PER CURIAM. I have no hesitation in saying that the answer of the Sheriff should be maintained, and the first exception and the other exceptions are also overruled in favour of the plaintiff, whose action should be maintained.

*Duhamel, Pagnuelo & Rainville, for plaintiff.
Doutre & Joseph, for defendants.*

Loranger, Loranger & Beaudin, for Sheriff.

THE LATE CHIEF JUSTICE DUVAL.

[Concluded from p. 160.]

Duval était admirablement fait pour ces combats d'éloquence et ces luttes de paroles. Esprit vif et à aperçus rapides, et d'une conception prompte, intelligence d'élite servie par une mémoire remarquable, de fortes études légales et un travail incessant; spirituel, railleur et caustique: doué en outre d'une remarquable facilité de langage et d'une voix sonore, ses plaidoyers incisifs, caustiques, brillants, sans manque de solidité, lui acquirent bientôt un grand renom comme avocat. Ses succès ne se bornèrent pas aux tribunaux civils. Il plaidait aussi au criminel, où, contrairement à ce que l'on aurait dû attendre d'un tempérament comme le sien, et d'un homme d'une sensibilité fort médiocre, sa parole s'élevait jusqu'à la haute éloquence. Une célèbre cause d'assassinat, qui pendant de longues années préoccupa l'attention publique, a surtout révélé cette aptitude inconnue jusque là.

Le talent de M. Duval n'était cependant pas sans reproche. On a quelquefois dit de lui qu'il était plus brillant que solide, et qu'il manquait de logique. Je crois que l'on s'est trompé et qu'il possédait au contraire un esprit fort droit et fort logique. Mais ce qui lui manquait à mon sens, c'était l'ordre dans la conception de ses idées et la méthode dans leur exposition. Ce défaut que les artifices de l'élocution peuvent quelquefois pallier chez l'avocat qui plaide une cause, ne peuvent

également se dissimuler chez le magistrat qui la juge.

Ce n'est cependant pas simplement au banc de la défense que M. Duval occupa devant les cours criminelles. Il représenta aussi le ministère public, et pendant plusieurs années, conduisit les causes de la Couronne. Quoiqu'on dise de ses succès dans la défense des accusés, je n'en persiste pas moins à croire que son talent était plutôt fait pour l'accusation que pour la défense, et qu'il a dû avoir plus de succès réels dans le premier rôle que dans le dernier.

Il était, à cette époque mouvementée de notre histoire, trop en vue comme avocat pour échapper aux honneurs parlementaires, et depuis 1830 à 1834 il représenta la haute ville de Québec dans la chambre d'assemblée. Je ne sais au juste dans quels rangs il s'est placé en chambre; je ne connais pas non plus grand chose de ses opinions politiques d'alors, mais je serais bien surpris s'il s'était servilement attaché à aucun parti. Il devait être trop frondeur pour soutenir franchement le gouvernement, et il était, d'un autre côté, d'allures trop indépendantes pour suivre l'opposition du jour, qui constituait la majorité. Il devait être du tiers parti fondé par M. Nelson; et après réflexion je crois le lui avoir entendu dire. A tout événement, dans la politique, qui ne devait pas convenir à ses habitudes et pour laquelle son tempérament n'était guère fait, il n'a joué qu'un rôle effacé.

Si cependant il a combattu le gouvernement, son opposition a dû être fort modérée, puisqu'en 1838, il fut nommé juge suppléant, en remplacement de l'un des trois juges, Vallières, Panet et Bédard, suspendus pour octroi du bref d'*habeas corpus* en faveur des accusés politiques. Cette charge ne dura cependant pas longtemps, et lors de la réinstallation des juges suspendus, il retourna à sa pratique d'avocat.

J'ai parlé de l'esprit proverbial de M. Duval et de ses vives reparties, que d'ailleurs tout le monde connaît. Parvenu au barreau il n'avait pas perdu son caractère railleur, que les gens peu patients n'enduraient pas toujours avec équanimité. Il s'exposait quelquefois même à de cruelles représailles dont sa stature peu avantageuse faisait ordinairement les frais. Il laissait cependant peu souvent les rieurs du côté de sa victime. A un avocat d'une grande taille

qu'il avait obsédé et qui lui disait dédaigneusement: Vas-t'en donc, pygmée! tu ne me vas pas à l'épaule, je suis plus grand que toi de toute la tête." Il répondit vivement: "Mais tu sais bien que chez toi la tête ne compte pas?—Pourquoi, demande l'autre, qui ne comprend pas très-bien.—Parce que, lui riposte Duval, tu es un être fait contre nature. Ne sais-tu pas qu'elle a horreur du vide?"

Un juge au criminel, devant lequel il avait sans succès détendu un accusé de peccadille, lui disait: "Je ne sais vraiment quelle sentence prononcer contre votre client." "La chose est cependant fort simple, lui répond l'avocat, faites comme si c'était pour vous."

Il demandait un jour au juge en chef Stuart, qu'il n'aimait pas, quand le tribunal serait prêt à rendre un jugement attendu depuis longtemps. Demain, répond le président du tribunal. Pas demain, dit M. Duval, après demain, s'il vous plaît, mais soyez sûr de le rendre.

Nommé juge de la cour Supérieure à Québec, il y siégea jusqu'au 27 janvier 1855, époque où il fut promu à la cour d'appel où il occupa le poste de juge puisné jusqu'à la mort du juge-en-chef LaFontaine, qu'il remplaça le 5 mars 1864. Le 30 mai 1874, après avoir occupé ce poste élevé pendant dix ans, il prenait sa retraite et rentrait dans la vie privée d'où la mort vient de le retirer pour une vie meilleure.

En changeant de position l'homme ne change point de disposition, et l'avocat devenu juge ne se dépouille pas de son tempérament comme il se dépouille de sa toge d'avocat pour se couvrir de la robe de magistrat. Son caractère comme son talent, restent au fond les mêmes, et les modifications obligées qu'ils reçoivent de ses fonctions nouvelles sont plus apparentes que réelles. Sur le siège du magistrat le juge en chef Duval est resté ce qu'il était au barreau, impétueux, caustique et quelque peu bizarre. D'un autre côté, il y apporta les grandes ressources de son talent enrichies par le vaste trésor de ses connaissances.

Personne n'avait le sens juridique plus développé que le juge en chef Duval, et la remarquable perspicacité de son esprit, ses vastes connaissances du droit, jointes à une longue expérience, lui faisaient, en un moment, et avant que l'avocat en eut fait un exposé complet, saisir le point d'une cause.

Le point d'une cause c'est bien souvent toute la cause, et ne le saisit pas qui veut. Il y a même des hommes remarquables qui n'y parviennent pas et restent déplorablement défectueux sous ce rapport.

Marie, un des membres du gouvernement provisoire de 1848, qui était aussi un avocat distingué, avait coutume de dire: "Une cause c'est une muraille nue; le point de la cause, c'est un clou qu'on y plante; l'avocat ou le juge, c'est un aveugle que l'on arme d'un marteau, et quand il a frappé le clou il a trouvé le point litigieux."

Armé de ce marteau, le juge Duval n'eût pas frappé deux fois la muraille sans atteindre le clou.

Certaines qualités du juge peuvent cependant se changer en défauts; ce qui arrivait chez le juge Duval. La rapidité de sa conception surprenait quelquefois son jugement, pourtant bien sain et bien droit comme je l'ai dit, et le portait à former hâtivement son opinion. Il jugeait trop *a priori*. La méthode analytique du juge-en-chef LaFontaine, la méthode synthétique familière au juge Aylwin et de fait toute méthode, paraissait lui être inconnue.

Cette rapidité de jugement qui eût entraîné dans de graves erreurs un homme moins capable que lui, ne paraît cependant jamais avoir été fatale à ses décisions, et l'on ne connaît guère de cas où il se soit gravement trompé. Il faut le reconnaître, ses conclusions, quelques hâtives qu'elles fussent, étaient généralement correctes.

"*Duval always jumps to the conclusion, but invariably falls on the right spot,*" disait de lui, en ma présence, un juge qui avait siégé avec lui pendant plusieurs années et que j'aimerais à nommer, si son extrême réserve ne s'imposait à la mienne.

Je ne veux cependant pas dire qu'il jugeait les causes sans examen et sans avoir mûri ses jugements. Ce serait de ma part une assertion aussi fautive qu'inconvenante, et tout-à-fait en dehors de mes intentions. Ce que je veux faire entendre, c'est que le défaut d'ordre de ses idées comme de ses connaissances fort vastes, mais mal digérées, lui rendait plus difficile qu'à un esprit plus méthodique que le sien, la rectification d'une opinion préconçue. Son jugement était trop rapide et ses facultés raisonnantes inférieures à ses facultés perceptives.

Son défaut de méthode qui se trahissait dans sa conversation toute à bâtons rompus et sans suite, était surtout perceptible dans l'exposition incomplète et tronquée des causes qu'il jugeait. On aurait dit qu'il ne lui importait guère d'être entré dans une cause, par la porte ou par la fenêtre, pourvu qu'il en connût l'ensemble, sans s'être préoccupé des détails, et qu'il la jugeât bien.

On ne peut cependant pas nier, que ce manque de discussion des questions en litige et cette absence de dissertation, tout en laissant intact le fond de ses jugements, n'en ait paralysé l'utilité au point de vue de la science du droit et de la jurisprudence. Un jugement doit être, dans nos usages juridiques du moins, un enseignement légal et un précédent raisonné faisant loi sur les points qu'il décide. C'est ce qui rend si précieuse pour la science pratique du droit, l'étude de la jurisprudence. Les jugements du juge Duval pèchent sur ce point, mais s'ils ne tiennent pas une large place dans les rapports judiciaires, leur auteur n'en restera pas moins dans la mémoire du barreau et dans le souvenir des populations un grand avocat et un juge distingué.

..

Le juge Duval était d'une intégrité à toute épreuve. Son désintéressement seul eut été la caution de son impartialité. D'un autre côté, il n'aimait personne assez pour le faire soupçonner de préférence.

Si cependant il aimait peu il ne haïssait pas du tout. C'est au moins un avantage que les indifférents ont sur les cœurs froids pour l'amour et chauds pour la haine.

Sur le banc il se souvenait qu'il était né franc, et s'il l'oubliait, c'était pour s'en venger par d'incessantes interruptions. Je me souviens, il y a de cela bien longtemps, qu'en un jour d'absence du juge en chef LaFontaine, M. Duval présidait la cour. J'allais plaider. Le président après avoir entendu l'appelant me dit M.... vous avez la parole. Je reste coi. Est-ce que vous n'avez rien à dire au soutien du jugement ? me demande-t-il. Oui, lui répondis-je, mais à une condition, c'est que vous me promettiez de ne pas m'interrompre. D'accord, dit-il, en riant, mais il ne me tint pas parole !

Un écrivain français, je crois que c'est Royer Collard, a dit, que la vie privée doit rester murée. Cette défense du domicile n'aurait pu servir au juge Duval qui semblait ne rien avoir à dissimuler dans sa vie intime. Il n'avait certainement pas de bijoux à cacher.

Sa porte était ouverte à tout le monde, et il semblait content de voir tous ceux qui allaient le visiter, sans montrer beaucoup de préférence à personne. Sa conversation était enjouée sans cependant se rendre jusqu'au rire et était fort facile pour ses interlocuteurs, qu'il n'obligeait pas à grands frais d'imagination, attendu qu'il la soutenait le plus souvent seul et qu'il ne leur demandait guère que des réponses qu'il n'attendait pas toujours, pour en faire une nouvelle. J'ai dit qu'elle était à bâtons rompus et sans enchaînement.

Il était sarcastique et malin, mais il n'était pas méchant, et s'il ne faisait l'éloge de personne, il ne dénigrait personne non plus.

Naturellement, je parle de lui comme je l'ai connu et comme l'ont connu ceux qui m'en ont parlé. Mais je ne l'ai jamais connu intimement. D'autres ont-ils surpris chez lui des sentiments plus vifs ? C'est ce que je ne saurais dire. A tout événement, ils paraissent avoir bien gardé le secret de ses faiblesses.

Qu'on ne croie cependant pas qu'il ne fut pas charitable. Il ne criait pas sur les toits ses actes de bienfaisance, mais ils ne n'en étaient pas moins réels. Ainsi, il contribua activement de ses efforts et de sa bourse à faire venir de France et à établir à Québec les Frères de la doctrine chrétienne, dont il fut toujours le protecteur, et il a, dit-on, fait instruire dans leur école une foule d'enfants pauvres sans jamais divulguer ses largesses. L'homme capable de ces bienfaits secrets doit en prodiguer bien d'autres.

C'était un chrétien convaincu, et quoique sans ostentation, un catholique sincère. Il a enduré avec courage la longue maladie qui l'a lentement conduit au tombeau, et dont les secours de la religion ont adouci les douleurs.

Le juge-en-chef Duval a passé seul et dans l'isolement la première partie de sa vie, et il avait plus de 40 ans, quand il a épousé la femme aimable dont chacun connaît les belles qualités, et qui, depuis bien des années, fait l'ornement de la société québécoise.

THE BAR SECRETARYSHIP.

To the Editor of the Legal News :

SIR,—I regret that Mr. C. H. Stephens was not appointed Secretary of the Montreal Bar, as he has stronger claims to the position, even that the flying promises of his *confrères*, made years ago. He is a talented, clever young man, and has rendered great services to the profession by his large and extensive *Digest of Cases*, which, although hastily made and bearing the appearance of it, is nevertheless a very valuable work. His recent publication on *Joint Stock Companies* shows him to be, not only an indefatigable writer and worker, but also a learned and promising lawyer.

But Mr. Stephens is not and never will be the Secretary of the Bar, for all that. He wants an absolute requisite for that office, it is the knowledge of the French language. It is preposterous to appoint a Secretary who cannot speak the language of three-fourths of those with whom he has to deal, and the reason why the Secretary of the Montreal Bar is seldom an English advocate, is that there are very few English lawyers who can speak French, how strange and anomalous soever it may be in this Province; while most of the French lawyers, although unable to speak English when coming out of the college, will be able to do so at the end of their clerkship, or at least a few years after their admission to practise. Let young lawyers take a warning from this. Unless they can speak fluently both languages, they will always labour under a disadvantage.

A second reason for appointing a French secretary this year, was that the President was chosen among the English advocates. Let it be remembered that in this section there are over two hundred French and less than one hundred English advocates. Last year, the President and Secretary were French, but the Syndic an English.

I regret Mr. Stephens' attacks on the present Secretary; they are unjust, unfair, uncalled for, and of questionable taste. Mr. Stephens' cause would have been stronger without them.

Yours, truly,

AN ADVOCATE.

PUBLICATION OF SALES.

To the Editor of the Legal News :

DEAR SIR,—There are a few questions I would

like to submit to you for your decision. I have asked several practising lawyers for their opinion in the matter; but, each, after giving his opinion, felt dubious as to the correctness of it.

Art. 572 of the Code of Civil Procedure reads as follows :

" . . . the sale of moveables must be " published by posting and reading a notice, in " a loud and distinct manner, at the door of the " church of the place where the seizure has been " made, immediately after morning service on the " Sunday next after the seizure." Now, the question is this: Suppose the seizure be made, the day for the publication of the sale at hand, and the bailiff ready to do his duty, but no service takes place, *what recourse is left to the bailiff?*

In some of the large parishes in this District (Ottawa), a seizure is made at one extremity, while the publication is read at another, at the door of the parish Church, a distance of eight or ten miles from the place, where the people or property is neither known nor cared for.

Has a judge a right to extend a term after having adjourned it to a subsequent day; or, in other words, has he the power to prolong the term by extending it from that subsequent day?

By answering these questions, either by inserting the answers in the "Legal News" or by letter, you will exceedingly oblige,

• •

[While we appreciate the compliment of an invitation to decide questions as to which "several practising lawyers" feel dubious, we are afraid we can hardly extend the province of the "Legal News," so as to anticipate the work of the Courts. We shall feel satisfied if we can, in a more and more perfect manner, keep our readers informed as to the actual decisions. We publish our correspondent's questions, however, and we shall have no objection to insert a reply by any correspondent who may feel disposed to express an opinion thereon.—Ed.]

RECENT CRIMINAL DECISIONS.

Escape pending appeal—Jurisdiction.—Where a person escapes from the custody of the law pending appeal, the appellate court loses jurisdiction, which does not attach by the capture of the prisoner.—*Lunsford v. The State*, Court of Appeals, Texas.

The Legal News.

Vol. IV.

MAY 28, 1881.

No. 22.

FOREIGN ENLISTMENT ACT.

In rendering judgment in the case of the *Atalaya*, the Judge of the Vice-Admiralty Court at Quebec directed attention to what he considers a defect in the operation of the Foreign Enlistment Act. The 23rd Section of the Act of 1870 confers upon the Executive authority power to seize and detain a ship and cargo, and upon a Court of Admiralty power to release them and award compensation in costs and damages in respect of their detention. The learned Judge pointed out the absence of an effectual check against the undue procuring of a warrant of search and detention, and further remarked:—"The 23rd Section provides only that if the Chief Executive authority is *satisfied* as to there being reasonable and probable cause to believe in 'equipping,' he may issue his warrant. A perusal of the depositions of Count Premio Real, the Spanish Consul-General, and his detective, will satisfy any reasonable person that there was such cause to be found in them for believing that the *Atalaya* was laden with arms and munitions, 'equipped' in the sense of the Act; and at the same time it is to be observed that the vessel had commenced her voyage, and had she escaped with them, and the slaughter of Spanish loyal subjects been the consequence, there would have been a reclamation from Spain for an indemnity, the responsibility for which would have rested with the Chief Executive authority. His Excellency the Governor-General, therefore, could not possibly do otherwise than issue his warrant. But if the evidence to satisfy the Chief Executive authority was sufficient, which it undoubtedly was, then it is quite certain that the information upon which the Consul-General of Spain acted was most defective, and that his relying upon the erroneous representations of another has been the detention of the *Atalaya* without reasonable or probable cause. If it can be left to a detective, in the working up of what he may call the case, so to influence the political or commercial agent of a foreign country, as to set in motion against a subject of

a friendly nation so dangerous an engine of power as the Foreign Enlistment Act, 1870, there must be some deficiency in the enactment. The official correspondence published in the case of the *Alabama*, between Earl Russell, Secretary of State, and Mr. Adams, Ambassador of the United States, shows the danger of tardy action where a vessel escaped, and this case the danger of haste where one was detained. The difficulty thus presented is one of the most serious nature even where neighboring countries are at peace, but in times of internal commotion such as have existed in this country and the United States, or when they are at war, the danger becomes indefinitely magnified. The coasts of the Dominion on the Atlantic extend from Maine to Cape Breton, their line runs along the Gulf and the great estuary of the St. Lawrence, and its border line passes through the St. Lawrence and the Great Lakes, across a continent to the Pacific Ocean, and if from any point communication by the electric wire can procure the seizure and detention of a ship and cargo owned by a subject or a foreigner, there is no amount of loss to which the Imperial Treasury may not be exposed."

IMPERIAL DISTINCTIONS.

The honor of knighthood has been conferred upon Chief Justice Ritchie, of the Supreme Court of Canada. As this distinction has been lavishly bestowed of late years upon our public men, it is not going far to add to the list of knights the highest judicial officer of the Dominion, and we presume that Sir W. G. Ritchie's successors will usually be accorded the same title. But while we notice with pleasure that Canadian Judges are not overlooked in the distribution of Imperial honors, we could have wished that the present list had included the name of one other, than whom none more worthy. We hope that in connection with the proposed changes in our Superior Court, and the creation of a new Chief Justiceship, the omission will be corrected, and that the honor of knighthood will be conferred on the present Chief Justice, whose brilliant career at the bar and long and honorable service on the bench would render such a distinction peculiarly appropriate. Doubtless no one has occasion to care less for such a mark of recognition, for his record lives in the hearts and memories of a

noble profession, and it is equally certain that the learned President of the Court would be far from seeking an honor which can invest with no brighter halo the name of Meredith. But while we refrain from urging claims universally conceded to be just, to a title which, for aught we know, might be distasteful to the recipient, we can hardly notice the investiture of others with this distinction without pointing out what we must regard as an untoward omission.

JUDICIAL CHANGES.

Sir William Young having resigned the position of Chief Justice of Nova Scotia, the vacancy has been filled by the appointment of the Hon. James McDonald, late Minister of Justice. Mr. McDonald has filled the arduous position of Minister of Justice with credit to himself and to the country, and there is no reason to fear that his judicial career will be less honorable.

Vice-Chancellor Blake, of Ontario, has left the Bench, and returns to the forensic arena. His place is to be occupied by Mr. Thomas Ferguson, Q.C.

PRODUCTION OF TELEGRAMS.

In a recent case in England of *Tomline v. Tyler* (44 Law Times, 187), it was held by Justices Lush and Manisty, sitting in an election case, that the post-office authorities, who in England have also the management and control of telegraphic correspondence, may be ordered to produce telegrams. Mr. Justice Lush said that "the Legislature, when they transferred the telegrams to the post-office, intended that the public should be just as well off as they were before, when they could always compel a telegraph company to produce the telegrams, just as they could compel any person to produce a letter." This ruling is in accord with the law in Canada and in the United States on the same subject.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, January 31, 1881.

Before JOHNSON, J.

McLENNAN v. GRANGE.

Costs on dilatory exception—Security for costs.
The plaintiff describing himself as a resident

of the United States, the defendant filed a dilatory exception for security for costs. The plaintiff complied with this demand, but refused to pay the costs on the exception. Thereupon the defendant inscribed it for hearing on the merits.

Mr. Joseph, for defendant, contended that the plaintiff ought to pay the costs, as he should have declared on the return day of his action, or at least when he received an appearance for defendant, that he would give the necessary security, and thereby save the latter the trouble and costs of such a demand. That it would be manifestly unjust and unfair to defendant, if plaintiff could free himself from the payment of these costs, inasmuch as the defendant was obliged to make a deposit to guarantee the costs of the other party on his exception; and consequently, if the plaintiff can claim these costs so soon as after adjudication, *a pari ratione*, the defendant should have the same benefit.

Mr. Cross, for plaintiff, submitted that the costs should follow the result of the suit, and cited in support *Martin v. Foley*, 2 Legal News, p. 182, decided by Mr. Justice Torrance.

The Court sustained the defendant's views and maintained the exception with costs.

Davidson, Monk & Cross, for plaintiff.

Doutre & Joseph, for defendant.

SUPERIOR COURT.

MONTREAL, May, 1881.

Before MACKAY, J.

FAIR es qual. v. CASSILS et al.

Evidence—Action instituted by assignee—Assignee cannot be a witness for himself.

Hon. R. Laflamme, Q.C., produced as a witness the plaintiff John Fair, who had instituted the action in his quality of assignee.

L. N. Benjamin, for the defence, objected, inasmuch as Mr. Fair was "the plaintiff in the case, and it is not competent for him to be examined as a witness in his own case; that the knowledge that he has obtained in connection with the matters in issue can only have been obtained by him personally in his capacity as assignee, being the same capacity in which he brings the suit."

The question was argued and numerous authorities were cited on both sides, the Hon. Mr. Laflamme contending that the plaintiff in

this case was not actually a party to the suit, that the creditors were virtually the plaintiffs, and that the assignee was merely acting as their attorney by a special provision of the law.

His Honour, in deciding on the objection, said that without adopting all the reasons contained in the objection of the defendants, he held that a plaintiff cannot under our law be examined as a witness for the plaintiff, in an action brought by himself. Under our law, he explained, the rule of the Roman law, that a plaintiff could not be examined in his own behalf, was still in force, and to be followed in this case. A plaintiff cannot be a witness for himself in his own case, and nothing had been shewn to support such a proceeding. His Honour quoted the case of *Battersby v. The City of Montreal*, in which a similar motion was taken *en délibéré* 14 Oct. 1876, and maintained.

Mr. Laflamme said this was an important suit, and as there were still some points he would like to urge he would respectfully move, "that seeing the decision rendered this day, the plaintiff declares his intention to appeal from this judgment, and that the case be suspended until an application be made to the Court of Appeals on 11th June next."

Mr. Benjamin objected on the ground that the trial was virtually a jury trial, and such being the case the trial must proceed.

PER CURIAM. I think this is a case in which I should grant the motion.

Motion granted.

Laflamme, Q.C., for plaintiff.

L. N. Benjamin, for defendant.

SUPERIOR COURT.

MONTREAL, May 14, 1881.

Before TORRANCE, J.

CROWLEY v. CHRETIEN.

Sale—Lesion—Circumstances amounting to fraud.

Where part of the price of immoveables consisted of a number of shares really worthless but to which a fictitious value had been affixed by fraudulent means within the knowledge of the transferor, the sale was set aside at the suit of the purchaser.

This was an action to set aside a deed of sale of land made by Crowley to Chretien on the 21st July, 1880. Part of the consideration was two *hypothèques*, one due to the Royal Institution for \$3,400, and the other to the Dundee Trust

and Investment Co. for \$4,500; and the balance of \$8,100 was declared by the deed to have been paid to Crowley by the delivery to him of 81 shares in the capital of a corporation called the Silver Plume Mining Company, of the par value of \$100 each share.

The complaint was that Crowley had been induced to accept of the shares by *dol* and fraudulent manœuvres on the part of Chretien.

The plea set up litispence in an action No. 709 hereafter to be referred to, and it was followed by the general issue.

The plaintiff had answered in law to the plea of litispence, and the decision on the law hearing had been reserved.

PER CURIAM. I may as well here dispose of the law hearing by deciding that the plea of litispence is not made out. Next, as to the merits of the action. The main issue is the charge of fraud brought against the defendant Chretien by which Crowley was induced, he says, to accept of eighty-one shares in the Silver Plume Mining Company for \$8,100. This company represented itself to be a corporation, but this Court has already decided that it was not so, by its judgment of date 15th March, 1881. It obtained a place on the stock exchange with a nominal capital of \$1,000,000. It had cost its shareholders \$15,000. Crowley says that fraudulent means were made use of to make the stock appear to be worth 72½ cents in the dollar, when in reality it was worthless. It is clear that the bargain was based upon the assumption that the stock had a commercial value, and that the quotations at the Stock Exchange were *bona fide*. Chretien is accused of having obtained Crowley's property, for what was not a real but only a nominal consideration, and to have arrived at this result by fraudulent means. There is no doubt in my mind that there was error as to the price in the mind of Crowley, for he imagined that he was obtaining the stock of a corporation regularly quoted on the Stock Exchange and having a commercial value, when no corporation, no *bona fide* quotation and no commercial value existed. Error and lesion as well as fraud are relied upon by Crowley. It was said against Crowley that Chretien was not responsible for the acts of Parent, unless they were immediately connected with the sale at the date of its execution. But Parent received \$10,000 of the stock for his

commission. He must have known what the pretended paid-up capital amounted to. His stock was sold to Mr. Baxter, who is proved to have obtained the publication by the *Gazette* of the annual report of the company, and Parent does not know of any *bona fide* purchaser of stock for more than 10 cents, and he must have known that the quotations at 72½ cents were not sincere. Mr. Dorion sells one day at 51 and next day buys at 52. What does it mean? I would refer here to the evidence of Mr. Kinsella, who speaks with discretion, but says frankly that he advised his clients to have nothing to do with the Silver Plume Mining Co. There is no proof of a single *bona fide* transaction in this stock at the Stock Exchange for these prices, or higher. Who bought it at 70 or 72? If the purchaser had been Parent himself the case would present no difficulty, and the relations of Chretien and Parent were such that they may be regarded here as one person. He allows Parent to borrow money on these very lots bought from Crowley. There is a remarkable contrast between the statements of Mr. Parent and Mr. Silverman as to the purport of an interview between them as to the disposal of the stock of the S. P. Mining Company. Mr. Silverman represents that Mr. Parent offered to put at his disposal in August or September several hundred thousands of the shares of the Company to be given in exchange to the dupes of Boston and New York for their gold, silver and precious stones. Silverman says he was offered a heavy percentage for his services as agent. Mr. Parent says Silverman is under a misapprehension. But who is likely to have been mistaken? Parent admits he was very much interested in this litigation. We don't know what Silverman's interest was, but he seemed to think that the day of retribution would come, and that though justice had leaden feet she had iron hands. I have no hesitation in saying that looking at all the circumstances of the case, the lesion, and the creation of the Silver Plume Mining Company, its report, and what I believe to be the simulated transactions in the stock, a very plain case of fraud has been made out, and that the deed of sale of date the 21st of July and the deed of lease of same date should be set aside.

E. Barnard for plaintiff.

J. E. Robidoux for defendant.

SUPERIOR COURT.

MONTREAL, May 14, 1881.

Before TORRANCE, J.

ROWAN et al. v. DUBORD et vir.

Wife séparée de biens—Liability for goods bought for her business by her husband as her attorney.

PER CURIAM. The action was against a married woman, separated as to property by judgment of the Court from her husband, to recover a balance of account for goods sold and delivered. The question is as to whether the sale was to her or to her husband.

The defendants object to the form of the action, but I think the objection to be without foundation. The plaintiffs had a number of dealings with the husband in his own name, but in 1877, his wife took proceedings against him to obtain a judgment of separation as to property. Under this judgment, an execution at the suit of the wife was issued, and the husband signed a return of *nulla bona*. Next, on the 1st April, 1878, she gave him a full power of attorney to dispose of her property and administer her affairs, and on the 6th May, 1878, she signed a declaration that she carried on business alone, under the name of Joseph Richard & Co., as a hotel keeper and vendor of wines and spirituous liquors. The husband made purchases from time to time for the business, but it was only in March, 1879, that the plaintiffs discovered the real position of the husband. They had just delivered wines and liquors to the amount of \$364.90, and their clerk proposed to Mme. Richard to remove them, when she said they were in the house and she would be responsible for them.

Manifestly the business was the wife's and not the husband's, and the plaintiffs have properly brought their action against her as the principal and the vendee for whom the husband bought. Pothier, Mandat, No. 88. No satisfactory proof is made as to the item of interest, \$22.86, which will be struck out, and judgment go for the balance of the account, \$221.19 and costs.

De Bellefeuille & Bonin for plaintiffs.

Préfontaine & Major for defendant.

SUPERIOR COURT.

MONTREAL, May 14, 1881.

Before TORRANCE, J.

LALONDE dit LATREILLE v. PREVOST and divers creditors, and LALONDE et al., petitioners.

*Resale for false bidding—Adjudicataire.**Where the adjudicataire has retained the purchase money, under C. C. P. 688, and has appealed from the judgment of distribution, and put in security, a resale for false bidding cannot be demanded pending the appeal.*

This was a demand for resale for false bidding.

The petitioners set forth a sale of the land in question on the 11th September, 1878, to Jean-Baptiste Jules Prevost for \$1,005, which sum he has not paid; that by a judgment of date 31st October, 1878, Prevost was allowed to retain in his hands the purchase money on giving security under C. C. P. 688, which was done; that on the 15th December, 1879, the judgment of distribution was homologated, and no opposition or appeal was made to or from the said judgment within fifteen days; that on the 27th July, 1880, the judgment of distribution was served upon Prevost, who had not yet deposited the moneys; that on the 20th February, 1881, he was ordered, on petition of Henri St. Pierre and the heirs de Beaujeu, to deposit the money collocated in their favour, but he had not yet deposited the money. That petitioners were all collocated by said judgment. Prayer accordingly.

This petition was presented on the 11th March, 1881, and the *adjudicataire* Prevost answered that the petition was ill-founded, because it was presented in the name of different persons collectively, who had different interests; because the heirs de Beaujeu and St. Pierre had been paid their collocation; because petitioner had appealed from the judgment collocating Latreille and Leroux, and given security for the appeal which was now pending before the Queen's Bench, and Latreille and Leroux were the only ones now interested.

It was admitted that the heirs De Beaujeu and St. Pierre had been paid the amounts of their collocation and were now without interest, and that there was an appeal pending before the Queen's Bench.

PER CURIAM. The judgment of distribution was rendered on the 15th December, 1879, and

the writ of appeal was dated the 5th January, 1880, and the security bond in appeal was dated the 8th January, 1880, a few days after the fifteen days subsequent to the judgment of the 15th December, 1879. As to the objection which is preliminary in its nature, that the interests of the petitioners are not identical, I see no difficulty on that score. Petitioners cite C. C. P. 691 and 760, and 36 Vic., cap. 14, sec. 5, sub-sec. 3 (Quebec). This statute meets the case of the money being in the hands of the officer of the Court, or of the Treasurer; but, in the present case, the purchaser gave first security for the payment of the purchase money, and next for the condemnation in appeal. The cases cited of *Metrisse v. Brault*, 2 L. C. J. 303; *Coutlée v. Rose*, 6 L. C. J. 186; *Brush v. Wilson* 6 L. C. R. 59; *Hamilton v. Kelly*, 15 L. C. J. 168; and *Ex parte Burroughs*, 2 L. C. R. 9, do not appear to me to apply. I think that the appeal having been taken long before the petition, and security given, the *resale folle enchère* should not be proceeded with. The order is therefore refused.

Scanlan for petitioners.

J. O. Joseph for *adjudicataire*.

SUPERIOR COURT.

MONTREAL, May 14, 1881.

Before TORRANCE, J.

LEROUX v. DESLAURIERS, NORMAN, opposant and petitioner, and DUMOUCHEL, *mis en cause*.*Bailiff—Contempt of Court.**A bailiff who proceeds to sell the goods of defendant notwithstanding the fact that oppositions have been filed and that the prothonotary has made an order to suspend proceedings, is guilty of contempt of court.*

This case was before the Court on the merits of a rule for *contrainte par corps* against Narcisse Dumouchel, a bailiff of the Court. It was charged against him that acting as a bailiff in charge of a writ of execution against the goods of the defendant, having received oppositions and an order from the prothonotary of the Court to suspend proceedings and make a return to the Court, he, Dumouchel, did with malice and premeditation, illegally and fraudulently, on the 20th November, 1880, sell a sleigh (*voiture*) of the value of \$40, belonging

to petitioner, and did sell two other vehicles (*voitures*) of the value of \$200, claimed by Dame Julie Cardinal, the whole forming part of 29 vehicles (*voitures*) seized on defendant. It was further charged against Dumouchel that he had not made a return of his proceedings to the Court as he was bound to do by virtue of said orders. It was ordered that he be declared to be in contempt of this Court and imprisoned in the common gaol of this district for the period fixed by the Court unless he showed cause to the contrary. The answer to the rule alleged that the oppositions had only reference to 28 *voitures* whereas 29 had been seized; that in the *procès verbal* of seizure three sleighs with three seats had been mentioned as to which sleighs no opposition had been received and the sleigh in question claimed by the petitioner had three seats; that it was important for the petitioner to give a description identical with that given in the *procès verbal* so as not to lead the bailiff into error, which petitioner could easily have done, as he produced with his opposition a copy of the *procès verbal*; that he, Dumouchel, acted in good faith, and there being no opposition to the sale of the three sleighs with three seats, he addressed himself to the guardian, who gave him the sleighs described in his *procès verbal*; that he made his return into Court and it was mislaid.

PER CURIAM. There are three oppositions produced, claiming 29 *voitures* among other things. As to the return by Dumouchel, it is not proved that he is to blame here, for there is credible evidence that he made his return to the Court, though there is no authentic proof of such return. The difficulty is about three sleighs with three seats, which were so described in the *procès verbal* of seizure. One of these belonged to the opposant, Norman, and his opposition claimed *deux express sleighs et six autres sleighs* seized, in all eight, and one of them was an express sleigh with three seats. The order of the prothonotary was that the bailiff should suspend his proceedings and make return accordingly. The opposant, Dame Julie Cardinal, wife of the defendant, claimed seven *voitures* in some detail, and a similar order was given to make his return and the opposants. Sharpe et al. claimed 14 *voitures*, making the 29 seized, and procured a similar order. It appears, therefore, that the oppositions and orders

covered 29 *voitures*, which was the number seized. The petitioner calls attention to the fact that though the bailiff in his answer to the rule says there were 28 and not 29 seized, he should have persisted in selling not one, but three *voitures*, and the three opposants claimed the 29 *voitures* each for his share, and the bailiff mentioned the *voitures en bloc* without a description sufficiently particular to allow them to be recognized, and persisted in selling notwithstanding the protests and remonstrances made, and did not await the decision of the Court as to whether the oppositions covered the seizure. It is in evidence that the bailiff being in perplexity took advice, and as he would not see in the oppositions the precise identical articles seized by him, he was advised and he concluded that he could go on to sell. But the Court has carefully examined the description of the 29 *voitures* in the *procès verbal* of seizure, and must ask the question how it was possible for the opposants, the proprietors of these things, to recognize in the vague general description of the goods, the property they claimed. They might have had one thing in their mind, whereas the description of the bailiff in the *procès verbal* meant something entirely different. In a case of doubt the bailiff should have asked for information, or a specific order, and if he acted on his own responsibility, he acted at his peril. Notwithstanding the respectable advice invoked by the bailiff, and I refer to MM. Paradis and Fortier, Dumouchel was very wrong in what he did, and did rashly what was irreparable. The business of the defendant, a carriage maker, and that of the opposants, Sharpe et al. and Norman, might have satisfied Mr. Dumouchel that there was at any rate a colour of right in the pretensions of these opposants, for the vehicles were used by them in their business, and the defendant might and did have them in deposit for repair or safe keeping. The precise amount of the pecuniary loss may be shown by the statement of the witness Deslauriers, who says that the sleigh of Norman sold for \$7 was worth about \$20, and the two of his wife were worth respectively \$80 to \$90 and \$15, and sold for \$45 and \$5. The Court sees in the sales made by the bailiff of the three express sleighs with three seats a persistence in a foolish course after remonstrances and warnings given, and he took his course in defiance of consequences. The Court

is called upon to exercise its judgment and discretion in this matter, and has no doubt as to its obligation, though it does so most reluctantly, to declare the rule absolute with costs, and to order the imprisonment of the bailiff Narcisse Dumouchel for the period and term of seven days, and he is condemned to pay the costs of this rule and contestation, and to be imprisoned further until they are paid.

P. Lanctot for petitioner Norman.

A. Mathieu for Dumouchel.

THE WILLS OF EMINENT LAWYERS.

The will of the late Mr. Baron Cleasby is another instance of the fatality which seems to attend the wills of eminent judges and lawyers. The testator, it appears, had only given the trustees power to retain "securities," which it was considered would not extend to certain investments of the testator. It is certainly most strange how exceedingly unfortunate lawyers have been in their testamentary dispositions. Mr. Serjeant Hill's will was so confused, that but for the respect due to the learned Serjeant, it might not unreasonably have been declared void for uncertainty. The will of Sir Samuel Romilly was badly drawn. The wills of Chief Baron Thomson, Chief Justice Holt, Chief Justice Eyre, Serjeant Maynard, Baron Wood, Mr. Justice Vaughan, Francis Vesey, Jr., Mr. Preston, the eminent conveyancer, and Lord Chancellor Westbury, all became the subject of chancery proceedings. Chief Justice Saunders made a devise which puzzled his executors, who were all excellent lawyers. The will of Bradley, an eminent conveyancer, was set aside for uncertainty. The difficulty which arose from the loss of Lord St. Leonard's will is too recent to have been forgotten. But probably the most glaring mistake was made by a late master in chancery, who directed the proceeds of his estate to be invested in consols in his own name.

—*Law Times, London.*

RECENT UNITED STATES DECISIONS.

Nuisance—Burial Ground.—A burial ground which does not affect the physical health of the occupants of a dwelling house near which it is located, nor their olfactory by any effluvia from the graves, is not in law a nuisance. The human contents of graves cannot offend the

senses in a legal point of view. To become a nuisance the graves or their contents must be such in their effect as naturally to interfere with the ordinary comfort, physically, of human existence, and the inconvenience must be something more than fancy, delicacy, or fastidiousness.—*Monk v. Packard*, Supreme Judicial Court, Maine.

Contributory Negligence.—The plaintiff, a boy seven years old, while sitting on the sidewalk playing with the dirt, was run over by the defendant's team. The street was forty feet wide in a remote part of the city, and there was no defined sidewalk in the street, and the whole street was used alike by teams and foot-passengers. *Held*, that it was not contributory negligence in the plaintiff to sit upon the street.—*Murphy v. Roche*, Supreme Judicial Court, Massachusetts.

RECENT ENGLISH DECISIONS.

Contract—Sale of Machine for particular purpose—Failure to accomplish—Action for price.—The plaintiffs sued the defendants for the price of one of their patent gas machines, supplied by them to the defendants, saying that it was for the purpose of lighting the house of W., a customer of the defendants, asking them to go down and put it up, and telling them they could get all particulars about the house from their (the defendant's) foreman. The defence was that the machine was not reasonably fit for the purpose. It was proved at the trial that the machine failed to light the house; apparently not sending the gas a sufficient distance. *Held*, that the order was given for an undescribed and unascertained thing, stated to be for a particular purpose, and that the manufacturer could not sue for the price unless it answered the purpose for which it was supplied.—*Wright v. Cotton*, Court of Appeal, Feb. 19, 1881.

THE BAR SECRETARYSHIP.

To the Editor of the Legal News :

SIR,—I did not intend to notice anything that might be said further concerning the late election for Secretary, but the extraordinary statement made by your correspondent of last week (whose identity is plainly stamped on his letter), that I am ignorant of the French language, cannot of course be disregarded. Not

that it is of the slightest importance to the public whether I can speak French or not, but because it is of the highest importance to me whether or not I am to be considered as ignorant as is thereby implied.

Your correspondent's regret that I was not "appointed" Secretary, the flimsy hypocrisy of which is revealed by the flourish in which he declares "I am not and never will be Secretary," requires no comment; but when he alleges as a reason that I am ignorant of the French language, he indulges in a reckless and ridiculous falsehood. Though strongly averse to making a parade of what little knowledge I possess, I may perhaps under the circumstances be permitted to say that I can now, and could before I came to the bar, some five or six years ago, read, write and speak the French language, not with the fluency of one familiar with it from infancy, but with a considerable degree of ease and correctness; and since my admission to the bar I have, whenever occasion arose examined and cross-examined witnesses in that language, as many of my *confrères* can testify. I venture to assert, also, that I can do either of those things (read, write or speak the French language) better than your correspondent, notwithstanding the assistance he has received from a French professor within no very remote period. Indeed, it would be no very extravagant assertion to make that I can write in French better than your correspondent can write in English, to judge by the composition of his letter. It is an edifying spectacle to see this Nestor of the bar lecturing his colloquists in bad English on the necessity of learning French. In his zeal he grows almost prophetic.

"Oh, for that warning voice which he who saw
The Apocalypse heard cry in heaven aloud."

Young men, take warning. Take warning by me and the awful fate which has overtaken me. Study French, even if you have to call in the services of a French professor, and you may one day come to be Secretary of the bar. I wonder, by the way, if the learned counsel gets a commission for preaching up the necessity of French; or, perhaps, as he and his tutor are both professors, they exchange services. That would be a neat arrangement, and inexpensive, and I commend it to the young men, especially

those with an ambition to be Secretary of the bar.

I did intend to reveal the name of your correspondent, but I forbear, feeling assured he will have the good sense to acknowledge his error at the earliest opportunity.

Very truly,

C. H. STEPHENS.

[We think Mr. Stephens is under a wrong impression as to the identity of our correspondent. That, however, is a matter of extremely small importance. We gladly afford him the opportunity of correcting the misstatement as to his knowledge of the French language, and with this the discussion may appropriately be brought to a close. It is only fair to add, that in the hurry of going to press with our last issue, a typographical error in "An Advocate's" communication escaped correction—"an English" should have read "was English." With reference to the question of speaking both languages, our experience of 25 years is this: Young French lawyers are so politely desirous to converse in English with their English *confrères* that the latter are seldom permitted to acquire the fluency in speaking a foreign tongue which comes from practice. Moreover, English diffidence is such that an Englishman, while intimately acquainted with French or German, will seldom speak it except from sheer necessity, though if forced to speak it, he would speak more correctly than many French persons speak English. On the other hand, French Canadians, as soon as they pick up a few words of English, make the most of them, and quickly extend their knowledge of the tongue.—Ed.]

GENERAL NOTES.

The German Imperial Appellate Court has held the editor and the publisher of a newspaper guilty of publishing obscene writings, for putting the following advertisement in their paper:—"An unmarried gentleman, 28 years old, desires as a companion on a journey to Italy, which will last three or four months, a lady, not too young, with pretty looks. Offer, with precise statement of conditions, accompanied by photograph, may be sent to A.S.S., 299, care of this office. Strictest discretion assured." The Court considered that it was apparent from this advertisement that sexual relations were the object; and, the purpose being immoral, the offence was established, although the words did not appear to be obscene.

The Legal News.

VOL. IV. JUNE 4, 1881. No. 23.

THE U. S. JUDICIARY.

The *Ohio Law Journal* gives the following table, showing the number of the judges constituting the highest court in each State in the Union, the length of term, and their salaries:

State.	Number of Judges.	Term of Office.	Salary.
Alabama.....	Three.....	6 years.....	\$3,000
Arkansas.....	Three.....	5 ".....	3,500
California.....	Seven.....	12 ".....	6,000
Colorado.....	Three.....	9 ".....	3,250
Connecticut.....	Five.....	8 ".....	4,000
Delaware.....	{ 1 Chief Justice.....	For life.....	2,500
	{ 3 Associate Justices.....		2,500
Florida.....	Three.....	6 ".....	2,000
Georgia.....	Three.....	4 years.....	3,000
Illinois.....	Seven.....	9 ".....	2,500
Indiana.....	Five.....	9 ".....	5,000
Iowa.....	Five.....	6 ".....	4,000
Kansas.....	{ 1 Chief Justice.....	6 ".....	3,000
	{ 3 Associate Justices.....	4 ".....	3,000
Kentucky.....	Three.....	8 ".....	5,000
Louisiana.....	{ 1 Chief Justice.....	8 ".....	7,500
	{ 4 Associate Justices.....	5 ".....	2,000
Maine.....	Eight.....	7 ".....	3,400
Maryland.....	Eight.....	15 ".....	3,500
Massachusetts.....	{ 1 Chief Justice.....	{ During good behavior.....	6,500
	{ 7 Associate Justices.....	{ 8 years.....	6,000
Michigan.....	Four.....	7 ".....	4,000
Minnesota.....	{ 1 Chief Justice.....	7 ".....	4,500
	{ 3 Associate Justices.....	7 ".....	4,000
Mississippi.....	Three.....	9 ".....	3,500
Missouri.....	Five.....	10 ".....	4,000
Nebraska.....	Three.....	6 ".....	2,500
Nevada.....	Three.....	6 ".....	7,000
New Hampshire.....	{ 1 Chief Justice.....	{ Until 70 years old.....	2,400
	{ 6 Associate Justices.....	{ 2,200	
New Jersey.....	{ 1 Chief Justice.....	7 years.....	10,000
	{ 3 Associate Justices.....	7 ".....	5,500
*New York.....	{ 1 Chief Justice.....	14 ".....	7,500
	{ 3 Associate Justices.....	14 ".....	7,000
North Carolina.....	Three.....	8 ".....	2,500
Ohio.....	Five.....	5 ".....	3,000
Oregon.....	Three.....	6 ".....	2,000
Pennsylvania.....	Seven.....	21 ".....	7,000
Rhode Island.....	Five.....	For life.....	4,000
South Carolina.....	{ 1 Chief Justice.....	6 ".....	4,000
	{ 3 Associate Justices.....	6 ".....	3,500
Tennessee.....	Five.....	8 ".....	4,000
Texas.....	Three.....	4 ".....	3,500
Vermont.....	Seven.....	12 ".....	2,500
Virginia.....	{ 1 Presiding Judge.....	12 ".....	3,250
	{ 4 Associated Judges.....	12 ".....	3,000
West Virginia.....	Four.....	12 ".....	2,250
Wisconsin.....	Five.....	10 ".....	5,000

*Each judge is allowed \$2,000 additional for expenses.

BANQUETS TO JUDGES.

It appears that in New York there are some who would extend the public dinner business even to the judges. Surrogate Calvin has recently been honored with a "banquet." The *Albany Law Journal* very properly takes occasion to protest strongly against the threatened invasion. "It strikes us," says our contemporary, "as a very improper, undignified and unpleasant

affair. Why should a judge be publicly fed and praised in speeches because he has done his duty? Especially, why should this feeding and puffing be done by the lawyers who are in the habit of practising before him, and who are in some measure dependent on him for patronage? The surrogate has unquestionably been a remarkably faithful, intelligent, and impartial officer, but he should find his reward in private. Let him eat his own victuals and drink his own drink in the consciousness that he has done well; let his friends give him words of praise in private, if they will. Let us reserve these public demonstrations for the winners of boat-races and billiard matches, for acrobats, actors, singers, and the managers of political canvasses. This feature of our society is a disgusting one. If any one has an axe to grind with a public man he gets him up a public dinner, or gives him a cane, or a silver service, and thus assumes to take possession of the public man. In respect to a judge, it is difficult to say who deserves the severest blame—the lawyer who offers, or the judge who accepts such fulsome incense. We are glad to believe there are few of our judges who would so degrade themselves."

PERSONAL INJURIES.

Some criticism was called forth by the amount of damages for a crushed finger sanctioned by the Supreme Court, (see *ante*, p. 107). On this subject, "The value of the human body and bones," Mr. R. V. Rogers, jr., of Kingston, has penned an essay in his peculiar style, for the *Canadian Law Times*, which shows that juries and judges have permitted themselves considerable range in their estimate of personal injuries. We append a portion of the article.

One of the absolute rights of every British subject is that of personal security; and lawyers mean by that, the legal and uninterrupted enjoyment of life, limb, body, health and reputation. Any one interfering, either by accident or design, with the enjoyment by another of these rights, inherent by nature in every individual (unless, indeed, the interference is authorized by the proper power in the State), is liable to make good to the injured party the damages sustained by him. With questions of life and death, of health and reputation, we do not propose to deal; but we desire to glance at some of the very numerous cases which have been

decided in England, the United States, and Canada, upon the important subject of the pecuniary value of the various portions of a person's body. The value of the human form has been considered in many ways and by many people; not only in its dead state by medical students, in its captive state by slave dealers, but also in its living, free, independent state—and that piecemeal—by jurors unimpeachable, and judges learned and venerable who have viewed it as a corpse and as a captive as well.

To begin with what the Sunday-school boy said was the chief end of man—the *head*. No jury, we believe, has yet been called upon to value the whole head of a living man; and with accidents fatal in their effects, we have nothing to do here. But different parts of the head—inside and out—have been appraised by intelligent jurors. In Maine, a man who could say with Hudibras,

My head's not made of brass,
As Friar Bacon's noddle was;
Nor (like the Indian's skull) so tough,
That authors say, 'twas musket proof;

had the external table of his *skull* cracked by an iron poker, wherewith he had been assaulted by a brakesman, and in consequence of the injury he was threatened with palsy of the optic nerve. He sued the railway company for the wrong inflicted by their servant, and recovered \$4,000 damages; and although the company considered the amount excessive, the court did not. *Hanson v. European, etc., Ry.*, 62 Me. 84. But \$1,700 was held too much to pay for striking a woman's head with a hatchet; she having been very provoking, and not being much hurt. *Hennies v. Vogel*, 87 Ill. 242. When, on a steamboat, a person received an injury, *resulting* in the temporary loss of the sight of one *eye*, and the jury calculated the damage at \$5,000, the judges held the amount excessive, and ordered a new trial on that account. *Tenney v. New Jersey Steamboat Co.*, 5 Lans. 507. The jury, although not the judges, evidently considered this one of

Those eyes, whose light seem'd rather given,
To be ador'd than to adore—
Such eyes as may have look'd from Heaven,
But ne'er were raised to it before.

A little boy was kicked by a horse, and his eye, skull and brain were so severely hurt, that the witnesses at the trial considered he would

never be able to obtain a living in an ordinary way. The jury granted him £150, as a slight compensation; and although the child died nine days after the verdict, yet the court would not grant a new trial asked for on the ground of excessive damages. *Kramer v. Waymark*, L.R., 1 Ex. 241.

Ho Ah Kow sued the sheriff of San Francisco for \$10,000 damages for cutting off his *queue*. He had been fined for keeping a boarding-house in a manner contrary to the city by-laws, and in default he had been imprisoned in the county jail for five days; while in durance vile his head was shorn. The loss of his *queue*, he alleged in his pleadings, was a mark of disgrace, and attended with misfortune and suffering, and ostracised him from associating with his fellow-heavenlies here on earth. The defendant set up as a justification an ordinance of the city, authorizing the cutting off of a prisoner's hair. Kow demurred; and the judges were with him on the law, considering that such a rule was contrary to the celebrated fourteenth amendment of the Federal Constitution. *Ho Ah Kow v. Nunan*, 20 A. L. J. 250. What the jury said as to the value of the pig-tail, or if they have ever said anything, we do not know.

A judge and jurors attempted to estimate the worth of a man's *brains* in a late case. They calculated the value of that part of the brain that was injured (whether the bump of philoprogenitiveness, veneration or self-esteem, the reporter saith not, but we think it was the first named) at \$10,000. Roy was sitting in a Pullman car, and the upper berth fell once and again, the second time striking him on the head, injuring his brain, incapacitating him from the performance of his usual avocations, and necessitating medical treatment. The court held the railway company liable, but granted a new trial solely on the ground that the number and ages of the man's children had been given in evidence, apparently to influence the verdict of the jury. *Penn. Railway Co. v. Roy*, 22 A. L. J. 510.

It is a serious matter to touch a person's *face* unless "Barkis is willing." Mitchell, a very rich man, spat on the *cheek* of Mr. Alcorn in a public place; and for thus using the human face divine as a spittoon, a jury of his fellow-citizens mulcted Mitchell in the sum of \$1,000. He thought the amount excessive, but the

court did not assist him in getting a reduction. *Alcorn v. Mitchell*, 63 Ill. 553.

Kissing, too, is a very expensive way of touching the countenance of an unwilling fair one. A conductor on the Chicago & North Western Railway, saluted on the cheeks, Miss Cracker, a passenger on his train. The consequences were—not matrimony, but—a fine of \$25 for an assault, the dismissal of the gay Lothario by the company, and a verdict of \$1,000 against the company, at the suit of Miss C. The court did not consider the verdict excessive, as it is a carrier's duty to protect his passengers against all the world. *Cracker v. C. & N. W. Ry.*, 36 Wis. 657.

Some twenty years ago, in England, a little boy—aged five years, and named Cox—while playing on the highway, was, like the youngster before mentioned, kicked in the face by a horse that was there depasturing; he was badly hurt. The jury awarded him £20 for damages to his visage, but the court would not let him keep it, as they failed to see that the owner of the horse had been guilty of any negligence in allowing his equine to be at large. *Cox v. Burbridge*, 13 C. B. (N. S.) 430.

In fact a man's head is at least, judging from the view taken of it by some jurors, a very precious part of the body, and indeed everything connected with it becomes valuable. An individual once had to pay £500 for the slight amusement of knocking off another man's hat. He asked in vain for a new trial—i. e., of his case. 5 Taunt. 443.

Now to leave the head and come to the trunk and its more humble members. Many years ago, Mrs. Elizabeth Dudley was riding on the outside of a coach in England. The coachee, before driving under an archway into the stable yard of an inn, asked his passengers to alight; Mrs. D. was dainty and unwilling to soil her boots, and so preferred being driven into the yard. The coach was eight feet nine inches high, and the arch nine feet nine inches. The consequence was that Mrs. Dudley was severely and permanently injured about the shoulders and back (the Divine Sarah might have escaped). An action for damages, and £100 verdict the result. *Dudley v. Smith*, 1 Camp. 167.

One Grieve was standing on a wharf, at Brockville, as the steamer Niagara was leaving, to plough her way along the St. Lawrence.

The boat's fender caught in the wharf, broke, and hit G. on the shoulder and so hurt him that he lost the use of his arm. He recovered a verdict for £387.10s; but the court thought he had been guilty of contributory negligence and so allowed him to continue to grieve, and ordered a new trial, on payment of costs. *Grieve v. Ont. St. Co.*, 4 C. P. 387.

An injury to the *vertebræ* of the spine of a lady, married, had to be paid for by £500. Mr. and Mrs. Foy were travelling by rail; at the station where they stopped there was not room for all the cars to draw up to the platform, and some of the passengers, the Foyes among the rest, were asked to get out upon the line. Mrs. F.; with the aid of Mr. F., jumped from the top step of the car to the ground, a distance of three feet, and came down very heavily, jarring her *vertebræ* and injuring her spine. An English jury gave her the sum mentioned, and the judges declined to interfere. *Foy v. L. B. & S. C. Ry.*, 18 C. B. (N. S.) 225.

In Wisconsin, \$2,750 was given for the fracture of one of the spinal *vertebræ* and the dislocation of the hip-joint; and the court did not consider the sum exorbitant. *Houfe v. Fulton*, 34 Wis. 408. Nor did the court in Illinois think \$7,500 too much for a healthy young woman who, through a defect in a sidewalk, fell and fractured her lower *vertebræ*, so that paralysis ensued. *Chicago v. Herz*, 87 Ill. 541.

Mrs. Toms and her son and heir were driving in a buggy over a bridge on which some new planks had been placed. The nag shied at these, and backed up against the railing which broke; the hind wheels went over the bank, and the occupants of the buggy were thrown into the water below. Mrs. Toms' spine was injured, and even when before the jury she had not recovered her strength. The first victory was \$750 for herself and \$50 for her husband, for his consequential damages. Unfortunately she had insisted upon swearing at the trial, and the court considered that so improper that they set the verdict aside. *Toms v. Whitby*, 32 U. C. R. 24. Another trial was had, and the jury magnanimously gave \$2,500 to the suffering lady and \$250 for Mr. Toms. Again the court interfered, thinking the damages very large, and ordered a third trial unless the Tomses would consent to take \$1,250 between them; this they wisely agreed to do (35 U. C. R. 195), and the Court of

Appeal, to which the defendants went, would not take that sum away from them. 37 U. C. R. 100.

A school teacher was allowed to keep \$8,958 given for a permanent injury to her spine. *Ill. C. R. v. Parks*, 88 Ill. 373.

Arms, both male and female have been valued. The case just about to be cited must not be taken as a ground for arguing that a lady's arm is worth more than a similar lateral appendage owned by a gentleman. A Miss or Mrs. Sweely (we are not sure which, but judging from her influence on the jurors, we fancy she must have been married) was walking in the town of Ottawa and was severely injured through a defect in the sidewalk. Her arm was hurt so that the muscles gradually wasted away until she completely lost its use, and the wearing away was accompanied by constant pain. She sued the town, and the jury rendered a verdict in her favor of \$3,200, and this the court considered not excessive. *Ottawa v. Sweely*, 65 Ill. 434.

Another woman, through a railway accident, lost one arm and the use of the other, and was withal so bruised, battered, blackened and injured, that she was in constant pain, and suffered from impaired health and memory; she sued the company for damages. The jury at first took a moderate view and gave her \$10,000; the company cried "Pshaw! that's too much," and the court, thinking it exorbitant, directed a new trial. The second jury awarded \$18,000; the company and the court thought as before, and a third trial was ordered. The jury took the bit in their mouths and assessed the injuries of the damaged lady at \$22,500. The company more dissatisfied than ever, again appealed to the court, but the judges (doubtless impressed with the more than sybilline character of the proceedings) declined to interfere, and allowed the suffering—but persistent—woman to keep the money. *Shaw v. Boston & W. Ry.*, 8 Gray, 45.

Mr. Drysdale was (perhaps is) a clergyman, enjoying a salary of \$1,400; while travelling on a half-fare ticket (one of the numerous little perquisites of the cloth) he tried to shut a window in the car, and his arm was broken by the standard of a lumber car standing upon a side track. He was detained from his duties for eight weeks (whether either he or his people lost anything by this does not appear), and suffered great pain from time to time for eight

months (perchance his flock suffered similarly on Sundays, only longer). He sued the railway company and recovered a verdict for \$3,000. The company considered, and we think rightly, that this was too large a sum to be compelled to pay for breaking a part of a parson, and applied to the court to set aside the verdict. The court, however, deemed the figure not so exorbitant as to justify a reversal. This was in Georgia where ministers may be scarce; nearer home, we fancy, they are not so highly prized. *Western, etc. Ry. v. Drysdale*, 51 Ga. 646.

Query—Do ladies serve on juries in Georgia as they do in Montana (we believe)? If so, and Mr. D. was unmarried, young and good looking, we understand the verdict.

We are not left entirely in the dark as to the value of a Canadian's arm. One Watson, in 1864, was journeying on the Northern Railway, and went into the express car, where he should not have gone, but the conductor who saw him there did not tell him to leave. There was a collision, and W.'s arm, the right one, was broken; no one in the passenger car was seriously hurt. The injured man was in the house four and a half weeks and attended by two doctors; he suffered a good deal, kept the arm in a sling for some time, and then found it smaller than the other and scarcely fit to use. The jury gave \$2,000. The court said that the company might have a new trial upon payment of costs as they were not quite satisfied as to the extent of the plaintiff's injuries; and to the chief justice the damages appeared extremely large. *Watson v. N. R. Co.* 24 U. C. R. 98.

Coming down still lower we find what some people think should be paid for a broken wrist. Mrs. Jones was a nurse, and through a broken board in the sidewalk she stumbled and fell and fractured her right arm at the wrist, and for this the metropolis of the Prairies had to pay her \$1,000. *Chicago v. Jones*, 66 Ill. 349.

In Kansas, the court decided that \$5,000 was an excessive amount for the railway company to be compelled to pay for an injury causing a deformity of the right hand. *Union etc., Ry. Co. v. Hand*, 7 Kan. 380.

Fingers even have been valued. Fordham was getting into an English railway carriage. The door being at the side and opening outward, and having a parcel in his right hand,

he placed his left on the door plate to assist him in entering. The guard, without any previous warning, flung to the door and badly crushed F's fingers. Both the Court of Common Pleas and the Exchequer Chamber thought the guard had been careless and that Fordham had done nothing amiss, and so they let him keep the damages given by the jury against the railway company, £25. *Fordham v. L. B. & S. C. Ry.*, L. R., 3 C. P. 368; 4 C. P. 619, Ex. Ch. A servant and apprentice of one Hodsell, a goldsmith, was bitten by Stallebras' dog, two of the fingers, the right hand and the right arm being badly lacerated. Hodsell sued for the loss of the services of his apprentice, a lad of seventeen, and recovered £30, one-third for past loss and the balance for future loss. *Hodsell v. Stallebras*, 11 A. & E. 301. Some boys were coming home from school, and in passing a machine which stood unguarded beside the road, a child of seven years induced another of four to place his fingers within the machine, while another boy by turning a handle set it in motion; the fingers were badly crushed, and had to be amputated. The jury gave £10 damages for them, but the court considered that the owner of the machine was not liable. *Mangan v. Atterton*, L. R., 1 Ex. 239.

One Jackson was riding in the underground railway from Moorgate street to Westbourne Park, the car was full, yet at the stations others tried to enter, which those already within sought to prevent; the door being open as the car was about to pass into a tunnel, the porter slammed it to, and jammed Jackson's thumb in the hinge. The jury gave him £50 to salve his injuries. The judges of the Court of Common Pleas and of Appeal said: "Let him keep the money;" but when the company went before the House of Lords, that august assemblage said: "He cannot have the money, as the porter was not guilty of negligence." *Jackson v. Metropolitan Ry.*, L. R., 10 C. P. 49; 2 C.P.D. 125; 3 App. Ca. 193. Another passenger had a thumb squeezed in a very similar way by the porter shutting the carriage door upon it; and the jury estimated his injury at £20. The court thought that the evidence showed that the passenger and not the porter had been negligent. *Richardson v. Metropolitan Ry.*, 37 L. J., C. P. 300. Still another thumb was appraised in a later case. A man was getting into

a car, but before he had taken his seat the servants of the company shut the door without warning: the man's thumb was squeezed by the hinge, and in an action for damages, the jury, following the example set by the last, awarded £20 for the injury, but the court considered that there was no evidence of negligence on the part of the company's servants, and so set the verdict aside. *Maddox v. L. C. & D. Ry.*, 38 L. T. 458. Fortunately on our Canadian cars thumbs are not in such danger.

[To be continued.]

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, May 31, 1881.

JOHNSON, TORRANCE, RAINVILLE, JJ.

[From S. C., Montreal.

BARIL V. MASTERMAN.

Patent—Invention—Novelty.

An immaterial variation of a machine in general use cannot be the subject of a patent right: there must be at least a new adaptation of a known principle, or some change which has called forth the inventive faculty.

JOHNSON, J. This action was brought to recover damages from the defendant for having infringed a patent invention. The thing which was patented was a refrigerator; and the defendant answered the action first by a denial; and then by a special plea, averring that the invention claimed by the plaintiff had been in public and general use for over fifteen years prior to the plaintiff's alleged right. The learned judge who tried the case found the facts for the defendant, and gave judgment in consequence, dismissing the plaintiff's action; and the case now comes up for review on the whole of the proof.

The issues are these: First, the plaintiff says he is the inventor of a certain useful improvement in meat refrigerators, and has got letters-patent for this improvement, and that the defendant has used his property and right thus acquired. The defendant answers him: "You are not the inventor you pretend to be; you have only varied, without material alteration, an old machine in common use; and whether you are the inventor or not of this slight variation which you claim as an improvement, I have not infringed what you claim as your

"right; I have not used what you describe, but
"I have used something else."

There are two questions: Is the plaintiff the inventor? Has the defendant violated his right? On the first question the evidence is strongly against the plaintiff. There may be very little difference between the two things, one of which is claimed by the plaintiff as his invention, and the other by the defendant as having been used already a long time before the patent; but in these cases there must be something that calls forth the inventive faculty before it can be the subject of a patent right. It need not be an entire novelty, of course; it may be a new adaptation, perhaps, of a known principle; but here we see neither the one nor the other. We see the defendant using, for many years before this alleged invention, a kind of refrigerator made on the principle of causing a double current of air, by applying the laws of expansion by heat and contraction by cold. We see the plaintiff, years after this had been in use, getting a patent for substantially the same thing; the only difference between the two machines being that while both of them introduce a current of air which is cooled by contact with ice, one passes under the ice and the other over it. And we say it matters not whether the thing used by the defendant is very nearly the same, or even precisely the same as the plaintiff's so-called invention. He could not trammel the defendant's right to use what he had always used by petitioning for a patent and getting it, even with this immaterial variation. It appears from the plaintiff's factum that there has been at least one case, and perhaps more, in which the plaintiff has succeeded, but it does not appear that the same question was raised.

The judgment is confirmed in all respects.

Longpré & Co., for plaintiff.

Macmaster & Co., for defendant.

COURT OF REVIEW.

MONTREAL, May 31, 1881.

RAINVILLE, JETTÉ, BUCHANAN, JJ.

[From S. C., Montreal.

LORD et al. v. BERNIER et al.

*Contract made by partner for benefit of firm—
Action by firm.*

Where a mortgage on a schooner was granted to one partner individually for the benefit of the firm, and by him transferred to the other partner, and the firm had possession of the vessel, an action by the firm for the freight earned by the vessel was held to be properly brought.

BUCHANAN, J. One Charlebois, owner of the schooner Francis, gave a mortgage thereon for \$3,000, to James Lord, one of the plaintiffs, the defendant Bernier being then master of the vessel. About November 12th, 1875, James Lord on behalf of the plaintiffs, under this mortgage, took possession of the schooner, provided her with a new outfit for a voyage to Newfoundland, and found a cargo for her, and continued Bernier, as master at wages of \$40 per month. The vessel sailed, and arrived at Newfoundland, and delivered her cargo, and Bernier received from the consignees of the freight about \$680.

Some few days afterwards, Bernier, apparently without Lord's knowledge, rechartered the vessel for a voyage to England, and put another master in her, and he then received from the consignors of the new cargo about \$1,150 on account of freight. With these sums (in excess of the money he expended) he obtained from the Union Bank of Newfoundland a draft on the Bank of Montreal for \$1,400, and caused the same to be made payable to the order of his wife, and brought it home with him, and deposited it in the hands of Pacquet and Potvin, the other defendants. This draft, which, as the plaintiffs contend, represents the freight earned by the vessel, of which as mortgagees, they had taken possession, is their property, and they have attached it by process of revendication.

Two issues are raised; the first being that the plaintiffs have no right of action, because the mortgage in question never was the property of the co-partnership bringing the suit. On this head it is established that this mortgage was granted by Charlebois to Lord individually, and by him transferred to Munn, also individually, both these persons being plaintiffs and members of the co-partnership. Could this transaction, therefore, inure to the benefit of the plaintiff's firm so as to enable it to maintain a suit? The evidence goes to establish the fact that this firm usually took such mortgages in the name of an individual co-partner, and that the money advanced by Lord to Charlebois was part of the funds of the co-partnership.

It was not without some hesitation I arrived at the conclusion that the plaintiffs could recover under their action as brought, and I did so upon the principle laid down by the text writers, that if a party enters into a contract in his own name for the benefit of others, either he may be sued, because he entered into the contract, or those persons for whom he entered into it may be sued, and *converso* the agent may sue, or the parties for whose benefit the contract was effected may sue; so therefore an action may be maintained by all the partners on a guarantee given in terms to one only, if given for the benefit of all, or it may be maintained by that partner alone to whom it was given. Here the mortgage, as I have said, was given to one partner, by him transferred to another partner, and suit is brought by the firm, the actual owner of the mortgage, and under the rule of law above cited, the action was properly brought.

There now remains the question as to the right of the mortgagees to recover the amount of freight in question earned by the vessel.

The evidence appears to be conclusive, that about the 12th of November, 1879, the plaintiffs, availing themselves of a right conferred upon them by law, took possession of the schooner under the mortgage, and not only provided her with a new outfit, but also found a cargo for her, gave the defendant, Bernier, as master, an advance of \$50 on his wages, who acknowledged the plaintiffs as his employers, made advances to the crew, and provided the vessel with supplies; and the plaintiffs, as such mortgagees in possession, are, by the ruling authorities in English commercial law, held entitled to all the rights of an owner. These are the principles maintained by the judgment of the Superior Court, and consequently the judgment must be confirmed.

Kerr, Carter & McGibbon for plaintiffs.

Duhamel, Pagnuelo & Rainville for defendants.

SUPERIOR COURT,

MONTREAL, May 31, 1881.

Before TORRANCE, J.

MORIN v. BERGER.

Infringement of patent—Provisional order.

TORRANCE, J. The case is before the Court on

the merits of a petition for a provisional order against the defendants. The action began in January, 1880, and claimed damages against the defendants for infringement of a patent, issued in favour of plaintiff, with a prayer for an injunction against the defendants, prohibiting them from using the invention. In February, 1880, the plaintiff presented a petition praying for a provisional order against the defendants prohibiting them from using the invention during the suit. Issue has been joined on the principal demand as well as on the petition, and evidence at great length has been produced on the issue on the petition for a provisional order. The enquête began in February, 1880, and was only closed in the month of November. The order asked for is in the discretion of the Court, and in view of the great delays which have taken place in the completion of the enquête on the petition, seeing that the enquête on the main demand may easily be disposed of, I think it right to order the parties to complete their enquête on the principal demand before disposing of the petition, which is, as I have said, one of the demands of the principal action. I give this order after perusal of the enquête taken on the provisional petition.

Robidoux for plaintiff.

Beique & McGoun for defendant.

SUPERIOR COURT.

MONTREAL, May 9, 1881.

Before CARON, J.

THE MOLSONS BANK v. LIONAIS, & HON. L. T. DRUMMOND, T. S.

Incidental demand filed during contestation of a saisie-arrest by the garnishee must be served on the defendant—The proper remedy a new writ—Monies not due at the time of the issuing of the writ, can not be attached.

CARON, J. Un bref de saisie-arrest après jugement a été émané et signifié au tiers saisi, qui l'a contesté sur différents moyens de forme. Pendant que cette contestation se débattait, la demanderesse produisit une demande incidente qui fut seulement signifiée au tiers-saisi et non au défendeur. Cette demande avait pour but de demander une condamnation contre le tiers-saisi, pour des argens devenus dûs et échus pour du loyer, depuis l'émanation du bref de saisie-arrest. Cette demande incidente a été contestée par le tiers-saisi.

Je suis d'opinion que la demande incidente aurait dû être signifiée au défendeur, car, il est en réalité la partie adverse de la demande incidente, ce sont ses argents qui sont saisis, et il a plus d'intérêt que le tiers-saisi à les conserver. Je ne crois pas qu'une demande semblable puisse être faite sur un bref de saisie-arrêt, qui n'est qu'un bref exécutoire d'un jugement, les articles 18 et 147 du C.P.C. ne peuvent s'appliquer à la cause actuelle, et il me semble que le moyen qu'aurait dû adopter la demanderesse, est celui d'une nouvelle saisie-arrêt.

Pour ces motifs, je maintiens la contestation et renvoie la demande incidente avec dépens. Je n'ai aucune hésitation à déclarer incidemment, que lorsqu'une dette n'existe pas, lors de l'émanation ou de la signification d'un bref de saisie-arrêt, et qu'elle ne vient à exister que postérieurement, qu'alors elle ne peut pas être arrêtée en vertu de ce bref qui ne vaut pas, il faut une nouvelle saisie, et je concours pleinement dans le jugement de la Cour de Révision, rendu dans cette cause entre les mêmes parties, moins le tiers-saisi, qui était la Société de Construction Mutuelle des Artisans, et rapporté au Legal News vol. III, (1880) p. 116.

Barnard & Beauchamp, for plaintiff.

Piché & Moffat, for garnishee.

SUPERIOR COURT.

MONTREAL, May 31, 1881.

Before PAPINEAU, J.

THE ST. ANN'S MUTUAL BUILDING SOCIETY v.

REV. JAMES BROWN.

Corporation — Acquisition of Immovables — Demurrer.

PÉRURIAM. La demanderesse poursuit le défendeur pour une partie du prix d'une vente qu'elle a consentie au défendeur le 5 de mai 1877, et divers versements à faire au lieu d'intérêt, et aussi pour partie du montant d'une obligation de \$1,000 qu'il a empruntées de la demanderesse subséquemment. Elle lui donne crédit du prix du loyer d'une propriété qu'elle a louée du défendeur.

Le plaidoyer du défendeur se réduit à prétendre que la demanderesse a acheté d'un nommé Cox la propriété qu'elle a plus tard revendue au défendeur. Que la demanderesse étant une main morte, n'avait pas le droit d'acquérir des immeubles sans une autorisation spéciale du souverain ou du parlement, sous l'opération de l'art. 366 du code civil. Que cette disposition du code n'est qu'une reproduction d'une partie de l'édit de 1743, qui par une autre disposition frappait de nullité les acquisitions d'immeubles, ainsi faites sans l'autorisation du souverain. Que la vente à la demanderesse étant nulle, celle de la demanderesse au défendeur était également nulle, et qu'elle ne doit

rien du prix. Que le montant dû sur l'obligation étant compensé par le loyer dû au défendeur, il revient quelque chose à ce dernier qu'il se réserve le droit de réclamer par la suite.

Il conclut à ce qu'il soit déclaré que la vente par Cox, à la demanderesse le 3 d'avril 1876, était nulle, et n'a jamais transféré la propriété à la demanderesse, et à ce que l'action de la demanderesse soit renvoyée avec dépens.

La demanderesse a fait une réponse en droit qui peut se réduire aux moyens suivants:

1. Le défendeur ne fait voir aucun intérêt à se plaindre de la nullité de la vente de Cox à la demanderesse, qui est *res inter alios acta*.
2. Il n'est pas vrai en loi que la demanderesse n'ait pas le droit de faire cette acquisition quand elle l'a faite.
3. Il ne prétend pas avoir été évincé ni même troublé.

La demanderesse a répondu spécialement que lors de l'acquisition qu'elle a faite de la propriété de Cox, elle l'avait acquise de lui pour des avances qu'elle avait faites à ce dernier, qui était un de ses membres, et qu'elle lui en avait consenti de suite un bail, avec la convention qu'il pourrait redevenir propriétaire en remboursant à la demanderesse les avances qu'elle lui avait faites. Que ce n'était qu'un mode permis par la loi d'assurer le recouvrement des avances faites par la société à ses membres, et que Cox n'ayant pas rempli ses obligations, avait perdu ses droits sur la propriété qu'il avait cédée à la demanderesse.

Les répliques sont générales.

Par l'art. 366 les gens de main morte et corps incorporés ne sont pas absolument et dans tous les cas incapables d'acquérir des biens immeubles ou réputés tels, sans l'autorité du souverain. Cet article fait voir qu'il y a certaines fins pour lesquelles les corps incorporés peuvent acquérir des immeubles, puisqu'il contient l'expression d'une exception.

Il n'y a donc pas nullité absolue et générale de toutes les acquisitions faites par des corps incorporés, et ces nullités n'étant pas pour tous les cas, ceux qui les prétendent doivent faire voir que dans le cas particulier dont ils se plaignent, la nullité existe.

Le défendeur ne le fait pas voir. Il ne se prétend pas évincé ni même troublé. Il ne fait pas voir que dans le cas particulier de l'acquisition par la demanderesse de la propriété de Cox, la demanderesse n'avait pas le droit d'acquérir. Il aurait dû faire connaître la cause de nullité afin que la cour pût prononcer en connaissance de cause. D'ailleurs Cox n'est pas en cause et il pourrait y avoir imprudence à déclarer nulle une vente faite par lui sans l'entendre.

La réponse en droit est maintenue. Les défenses du défendeur sont renvoyées, et jugement est rendu en faveur de la demanderesse suivant les conclusions de sa demande.

Doutre & Joseph, for plaintiffs.

Girouard & Wurtele, for defendant.

The Legal News.

VOL. IV. JUNE 11, 1881. No. 24.

THE LAW OF LIBEL.

Mr. Irvine's Bill, already adverted to, has been thrown out on a close division. In consequence of some change of system at Quebec, the press are no longer supplied with copies of bills, and of votes and proceedings, and the ordinary darkness which reigns over legislative business in this Province, has become more profound. We have not, therefore, had an opportunity of seeing the clauses of the bill, but the objection to it appears to have been the supposed encouragement it would afford to the publication of reckless statements, and wilful and malicious slanders. The majority of the House conceived that it would do more harm than good, and the bill was shelved accordingly. We do not clearly see why there should be any difficulty on the subject. We presume that the press would be satisfied if our law were placed on the same footing as in the United States. What the law is there we find concisely stated in a recent article in the *Albany Law Journal*:—"The truth may be given in evidence; and if it shall appear that the publication was with good motives and for justifiable ends, the jury may acquit in a criminal case, and the damages may be mitigated in a civil case." Probably, our law as to civil cases (which alone were in question in Mr. Irvine's bill) is not far different, but it would be well to leave no ambiguity about it.

NOTICE OF JUDGMENTS.

A correspondent directs attention to what he considers a *desideratum* in the Superior Court. He is desirous that judgment should not be rendered in the absence of counsel, and he bases this petition upon the fact that errors arising from oversights or misapprehensions, which might be rectified on the spot, become irrevocable if counsel are not present. The Court of Appeal, of late, has adopted a system of notifying counsel by post-card of the date of final judgment. The expense is very small for the great boon thus conferred on the profession. In old times, we have frequently

known lawyers to wait in Court a whole day, for a judgment which came not. As proceedings in the Superior Court yield a revenue to the Government, the Prothonotary might, perhaps, be authorized to incur this small expense, not exceeding 2 cents for each cause disposed of.

JUDICIAL APPOINTMENTS IN ENGLAND.

It has been remarked that the last three appointments to the English bench have been non-political. Mr. Justice Cave and Mr. Justice Kay (the latter appointed to fill the vacancy in the Chancery Division, caused by the resignation of Vice-Chancellor Malins) were not in politics at all. Mr. Justice Mathew was a candidate for an Irish borough, but was not a party man. That these gentlemen, says the *Law Times*, should, under the circumstances, have been raised to the bench must be a mortification to members of the bar, who have spent many thousands in contests and petitions, and whose prospects of promotion are at present very slight.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, May 28, 1881.

Before MACKAY, J.

SHARPLEY V. DOUTRE et vir, and O'DOWD, T. S.

Exemptions from seizure—Ball Dress.

A ball dress is not exempt from seizure as "ordinary and necessary wearing apparel," under C.C.P. 556.

PER CURIAM. The plaintiff, having a judgment against the defendant, has attached or seized in the possession of the garnishee a ball dress, the property of the debtor.

The seizure is opposed for various reasons, some of form, but principally because (says defendant) a ball dress is exempt from seizure. The plaintiff denies this.

The objections of form have nothing in them, the defendant's first plea being to the merits, and so a waiver of form matter.

For the determination of the chief question, we must of course keep to our own law. It does not declare free from seizure under execution the clothes belonging to the debtor (as does the Louisiana code,) nor does it make liable to

seizure all the clothes except the *habit dont le saisi est vêtu et couvert* (as does the law of France.) Our law does not declare to be free from seizure the apparel and clothing of the *saisi*, largely; it allows that some may be seized; it has in view that the *saisi* may have clothing, or *vêtements*, seizable; these are the *vêtements* not necessary, or not ordinary; it frees from seizure only a certain quality of clothing, to wit, the ordinary and necessary; the other must go to satisfy the *saisi's* creditors, who, after all, have rights.

In the present case an expensive ball dress belonging to the debtor has been seized in the possession of a dressmaker; question is as to whether such an article is free from liability to pay the claims of creditors. Unless when seized it be necessary and ordinary wearing apparel of the debtor it is not, and *vice versa*. The word necessary is commonly defined to mean "needful," "indispensably requisite," and the word ordinary to mean "plain" not handsome, "customary," "of common kind or rank." Is a ball dress both necessary and ordinary? Is it necessary, for unmarried women, for all married women, rich or poor? It can only be used at balls. We do not ordinarily see persons, married or unmarried, walking about wearing ball dress, or apparelled so. A ball dress (says the creditor here) is an article of luxury and extravagance, not ordinary, not an article of common kind, nor indispensably requisite; if suitable to rich persons it is not to poor ones who can't pay their debts, &c. The ball dress seized in this case is of about \$80 value. That is a large sum. The debtor says that the dress was no more than necessary and suitable to a person in defendant's class in society.

I see from this case that the courts may hereafter have to decide with great nicety of what character is clothing seized; ordinary or not? necessary or not? All clothing being, certainly, not free, is a ball dress lying at a dressmaker's free? Would two go free and would a fancy ball dress go free? Would they, if sworn to be "no more than necessary and suitable to the defendant," though not at all rich, but in debt?

We see in other countries what difficulties are in the way of determining what is necessary clothing. Judges and juries are bothered with such questions, which are best and most promptly settled by juries, supreme judges of matters of fact. Smith on Contracts and the cases on

this subject, referred to therein, are bewildering. Passing as a jury might upon the question, I find, for the plaintiffs, that the ball dress here, when seized, was not necessary for defendant and was not ordinary wearing apparel to be freed from seizure; so the *saisie arrêt* is maintained, and the defendant's pleas overruled, with costs against defendant.

Monk & Butler for plaintiffs.

Larreau & Lebeuf for defendant.

SUPERIOR COURT.

MONTREAL, May 28, 1881.

Before MACKAY, J.

GREENE et al. v. WILKINS, and LEWIS et al.,
intervening.

Business carried on in name of agent—Private agreement.

A business was carried on by a firm in the name of an agent, with whom they had a private agreement. Held, that the principals might intervene and claim goods seized by a creditor of their agent for a debt antecedent to the agreement, where it appeared that the seizing creditor had not been injured in any way by the secret arrangement.

PER CURIAM. Greene et al. have attached a quantity of goods in the Custom House, towards satisfaction of a judgment claim against Wilkins of over \$500. Wilkins has been carrying on business here as J. H. Wilkins & Co.

The intervening parties claim all that has been seized as their property, and say that any possession of them that Wilkins, nominally, had was that of a mere agent of them, Lewis & Co.

For title they show a private writing, a *sous seing privé*, of June, 1880, whereby it was agreed that W. F. Lewis & Co., should establish a store under the name of J. H. Wilkins & Co., to be managed by Wilkins as their agent; that Lewis & Co. were to supply him with all goods required, and charge the store with all goods imported and with a commission of five per cent. for buying; that defendant was to carry on as J. H. Wilkins & Co., for the benefit of Lewis & Co., and that defendant was not to make purchases. Lewis & Co. say that they did establish the store, put defendant into it as their agent, supplied all that was used or imported,

or proposed for the business, the goods seized being of them; that the defendant is still carrying on for the firm of Lewis & Co.; that the goods seized were purchased for the business by the intervening parties; that the plaintiffs' debt claim was incurred long previous to the agreement, and was unconnected with the business carried on under the name of J. H. Wilkins & Co., &c.

The intervention is contested by Greene, who says that the defendant was the real J. H. Wilkins & Co., for his own benefit; that the agreement if made when and as alleged (which is denied), was a fraud against plaintiff; that the goods possessed by defendant, and those seized among them, were and are the defendant's, really sold to him by the intervening party; that some of the goods seized were bought by defendant himself in Great Britain, and entered by defendant alone at the Customs; that others of the goods were sold to defendant at a profit by the intervening parties, who parted with the possession of them to Wilkins; that J. H. Wilkins & Co.'s partnership was never registered; that the intervening parties have allowed Wilkins to get credit by appearing to be possessed of large stocks of goods and chattels, &c.

By the *enquête* before me, a strange state of things is shown to have existed; a strange firm was that of J. H. Wilkins & Co.; an unusual agreement was that private one of June. *Sous-acting prief* writings are suspicious; third persons particularly are allowed to suspect them. Wilkins had, under Lewis' arrangements with him, great facilities for "taking in" people, had he used them, which, luckily, he did not. He had large appearance, though worth nothing. The interests of commerce and of commercial straight dealing men are not advanced by such secret agreements as this one of June. But the intervening parties have actually proved all, it may be said, of their allegations, and so may prevail against the contestant; for he has not been cheated, has not given goods or credit to Wilkins since that agreement referred to, and has not been damnified by it. His judgment has been obtained since it, and for causes which accrued long before. Upon the whole, the Court maintains the intervention and grants *main levée* of the seizure to Lewis & Co., notwithstanding the contestation, which is dis-

missed, but without costs, as the plaintiff had right to the amplest information.

Ramsay, for plaintiff.

Abbott, Tail, Wotherspoon & Abbott, for intervening parties.

SUPERIOR COURT.

MONTREAL, May 14, 1881.

Before TORRANCE, J.

DUQUETTE v. PATTENAUDE et al.

Bail under C. C. P. 828—Liability of sureties.

Sureties under C. C. P. 828, are liable absolutely, without an order previously obtained requiring the defendant to surrender himself into the hands of the Sheriff.

This was an action on a bail bond given under C. C. P. 828, in an action in a case of *Meloche v. Pattenauode*, in which judgment was rendered on the 26th May, 1880. In the present action the sureties were sued on the bond.

They pleaded to the action: 1o That the plaintiff was without interest in the case and was insolvent; 2o The general issue; 3o That if the sureties were liable, they were only liable as they would have been under C.C.P. 824, 825; that Dame Rose Delima Meloche has not yet obtained any order of the Court, requiring Olivier Pattenauode to deliver himself into the hands of the Sheriff; that such order has never been served upon Olivier Pattenauode or upon defendants; that said Olivier Pattenauode, during the pendency of the suit of *Meloche v. Pattenauode*, made a cession of his property under C. C. P. 763 and 766, and until this cession had been set aside by a judgment of the Court, the defendants could not, under C. C. P. 776, be liable as such sureties; that this action was therefore premature.

The Court overruled the pleas of the defendants, holding that they were liable under C. C. P. 828, absolutely.

Desjardins & Lanctot for plaintiff.

Geoffrion, Rinfret, Dorion & Laviolette for defendants.

PERSONAL INJURIES.

[Continued from p. 181.]

Legs have often been considered by juries and judges. We will submit to our readers the values at which these nether limbs have been held in England, New York, Massachusetts

and Canada—cases of men's legs, women's legs (we trust the printer will put these words in nonpareil type), and a baby's leg. Sharp boys and girls of the Lord Macaulay style can then readily find the probable value of their own legs by simple proportion. A New York court agreed with a jury in considering \$12,000 not too much for Mr. Rockwell, who, through an injury, was confined to bed for six weeks (suffering great pain), and unable to attend to business for several months, and was left permanently lame, after having paid from \$1,200 to \$1,500 for doctor's fees and such extravagances. *Rockwell v. Third Avenue Ry.*, 64 Barb. (N.Y.) 430. Apparently the value of lower limbs has gone up in the New York market, for some time since it was held that even \$6,000 was not an excessive sum to give for a broken leg which got well (to be sure) in about eight months; but the defendants got a new trial, to enable them to persuade the jurymen that such was a fancy price. *Clapp v. Hudson Ry.*, 19 Barb. 461. In Wyoming, \$10,000 was considered by the court to be an excessive compensation for a compound fracture of a leg. *U. P. Ry. v. House*, 1 Wy. Ter. 27. And even in Iowa, where \$4,000 had been given for a broken leg, the court reduced the sum to \$2,500. *Lombard v. Ch., etc., Ry.*, 47 Iowa, 494.

In Ontario, some twenty-five years ago, a jury gave one Batchelor £6,178 11s. 7d. for the loss of a leg (and a few other hurts); "that precious leg of Miss Kilmanseg that was the talk of 'Change—the Alley—the Bank—and with men of scientific rank, made as much stir as a fossil shank of a lizard coeval with Adam," could not have been much more valuable than the twelve jurors thought this. But the court said that it did not appear to them that the jury had exercised that sound and reasonable discretion, in awarding such heavy damages, as the law requires of them. And so a new trial was granted; but only upon payment by the guilty party of £500 into court, which sum Batchelor was to be at liberty to take out, without prejudice to his claim for damages *ultra* at another trial. Their Lordships were careful to say that they did not consider £500 sufficient to cover the damages sustained; in other words, they deemed a leg worth more than \$2,000. *Batchelor v. B. & B. Ry.*, 5 C. P. 127. In 1873, a butcher, earning \$50 a month, fell into a culvert made

by the Great Western Railway in the highway, and broke his leg in two places. In consequence, he was obliged to keep his bed for four months, and was hobbling about on crutches at the trial—six months after the accident. The leg was permanently shortened, and the doctor's bill proportionately long. The verdict was \$2,000; and Richards, C. J., on an application for a new trial, said, "on the whole, we cannot say the damages, \$2,000, are so excessive as to justify our setting aside the verdict on that ground;" and the judges did not set it aside on any ground. *Fairbanks v. G. W. R.*, 35 U. C. R. 523.

A teamster's leg is not thought much of by his fellow-countrymen; one of that calling, in Ontario, had his leg broken, owing to his falling off his load and his load falling on him, through a defect in the highway. He was confined to the house for some six weeks—could do nothing for some months—and then found himself so injured that he had to give up the employment of teaming. The jury, to mend matters, only gave him \$300, which the court let him keep. *Bradley v. Brown*, 32 U. C. R. 463. Strange to say, some years before the teamster's leg was broken, in the same part of the world, a deck hand was assisting in unloading a schooner at a wharf; the pier was out of repair, and Johnson (the mariner) broke his leg. He was awarded £250 for his pains and damages, and the court refused to order a new trial. *Johnson v. Port Dover, etc.*, 17 U. C. R. 151. In England, poor Armytage fared even worse than Bradley; he had his thigh broken by Haley's servant, when driving an omnibus. The surgeon was called in and gave evidence that it was doubtful whether A. would not always be lame, and he had been paid £10 for his attendance. The jurors, however, gave a verdict of one farthing damages! Armytage was rather naturally dissatisfied with the amount, and asked the court for a new trial to try to get more; he got the second chance. Denman, C. J., remarked: "A new trial on a mere difference of opinion as to the amount of damages may not be grantable, but here are no damages at all." *Armytage v. Haley*, 4 Q. B. 917. The jurymen in this case must have been of the same stripe as those miserable wretches who, in an action, under Lord Campbell's act, for damages for the death of a husband and father, gave one pound to the

sorrowing widow and ten shillings each to two fatherless little ones, as compensation. *Springett v. Balls*, 7 B. & S. 477.

One Greenland was on board "The Sons of the Thames," sailing between Westminster and London Bridge, and he was standing on the deck near the bow. The "Bachelor" collided with "The Sons" and the concussion caused the anchor of the latter steamer to fall from its place, and in falling it came against Greenland's leg which broke beneath the blow. He sued the owner of the "Bachelor," and recovered £200 damages. *Greenland v. Chaplin*, 5 Ex. 243. Tebbutt was standing at a railway station waiting for his baggage, and a porter in passing with a truck laden with trunks let a portmanteau fall off and injured T.'s leg. The jury fixed the damages at £300, and the court would not interfere. *Tebbutt v. B. & Ex. Ry.*, L.R. 6 Q. B. 73.

Mrs. Feetal was a Massachusetts lady and a spiritualist. One Sunday, she went to a camp-meeting of her sect, at which, among other wonderful things, a Miss Ellis was put in a box with her hands tied, and when the box was opened, a ring that had been on her finger was found on the end of her nose. On her way home by train, Mrs. F. had her leg broken, and on suing the company, got \$5,000 damages. The company objected strongly, on the ground that the accident happened on Sunday, and the lady had not been at divine service; but the court would not interfere. *Feetal v. Middlesex Ry.*, 109 Mass. 398.

A Canadian lady in the little town of Dundas stepped into a hole in the board walk, fell and broke her leg a little above the ankle. The hole was variously estimated at from sixteen to eighteen inches long, and from five to seven in width, but at the time of the accident was partly hidden by the snow. The defect had existed for some time. The jury gave a verdict of \$800 (the doctor's bill was over \$100). A new trial was granted, as it was by no means clear that the plaintiff had been guiltless of negligence, or that the defect was such as to make the corporation liable. *Boyle v. Corporation of Dundas*, 25 C. P. 420. The next jury estimated Mrs. Boyle's damages at \$150, and her husband's (for medical attendance and such like) at \$150 more. The chief justice remarked that these damages were moderate; we entirely agree with his lordship. 27 C. P. 129.

Mrs. Siner was more fortunate in obtaining damages from the jurors than her Canadian sister, although not so badly damaged. Her train—we mean the train in which she travelled—that is, the one that carried her, not the one which she carried—was too long to permit the car in which she was, to reach the platform: she stood on the front step, took hold of her husband's hands and jumped to the ground, and in doing so strained her knee. The jury gave her £300, but the judges were ungallant enough to say that the injury was all her own fault (she did not use the footboard), and would allow her nothing. *Stiner v. G. W. R.*, L. R., 3 Ex. 150; 4 Ex. 117.

A woman in Illinois had her knee injured. After three years she was not quite recovered, although she could walk naturally and gracefully, though one leg was smaller than the other, yet it probably was not permanently injured; she had not suffered much, and had lost no money. *Held*, \$2,500 excessive. 87 Ill. 128.

In Connecticut a baby two years old was run over by a train, and had a leg and an arm amputated in consequence. The jury tried to make things right by a verdict of \$1,800; how much for each member we cannot say. Here the question of imputable negligence arose; but with that doctrine we are not now concerned. *Bedfield on Railways*, Vol. II. p. 243.

A bite on a woman's leg was valued by an English jury at £50. A middle-sized black dog of the terrier kind, about eleven o'clock one night, bit a Mrs. Smith, a laundress, at a railway station. The canine had been haunting the depot for some hours; at 9 P.M., it had torn a lady's dress, at 10:30 it had attacked a cat, and been kicked out by a porter, and shortly after it worried Mrs. Smith's calf. The verdict, however, was set aside, the court deeming that the company had not been guilty of any negligence in allowing the presence of the dog. *Smith v. G. E. R.*, L. R., 2 C. P. 4.

The court held that \$1,950 was not too much for Crawford to pay for putting a buckshot into Cameron's leg and a rifle-ball through his left lung. 88 Ill. 312.

For a sprained ankle \$2,500 is excessive. Spicer was a mail agent on a Chicago line, and fearing a collision, jumped from a passenger train while it was in motion; in doing so he

sprained his ankle, and consequently was confined to the house long enough to lose two weeks' salary (at the rate of \$1.080 per annum). The court considered the jury far too liberal. *Spicer v. Chicago, etc., Ry.*, 29 Wis. 580. A truck went over the ankle of a boy of fourteen, and through the improper conduct of the surgeon called in to attend it (as the plaintiff's witnesses swore) the foot mortified and had to be amputated. The jury gave the boy a verdict for nominal damages, and the court would not grant a new trial on account of the smallness of the damages, because the judge who tried the case was not dissatisfied with the verdict. *Gibbs v. Tunaley*, 1 C. B. 640.

We do not know exactly in what part of the body lie hid one's "feelings." Wherever they are, they are not much thought of; and even a "shock to the feelings" of a wife by her husband's death cannot be considered in awarding damages. *Nashville, etc., Ry. v. Stevens*, 9 Heisk. 12.

In the good old days of the Saxons, the *bot*, or penalty, for the smallest disfigurement of the face was three shillings; the same for breaking a rib; the breaking of a thigh was twelve shillings; the robbing a man of his beard, twenty shillings; and a front tooth was valued at six shillings. *Taswell-Langmead*, p. 41.

And now a word or two as to what should be taken into account by a jury in estimating the amount of damages to be awarded for personal injuries. The American courts have held that the loss of time caused by the injury is proper to be considered. *Jones v. Northmore*, 46 Vt. 587. The age and the situation in life of the injured one; the expenses incurred; the permanent effect upon the plaintiff's capacity to pursue his professional calling, or to support himself as before times (*Whalen v. St. Louis, etc., Ry.*, 60 Mo. 323; *Indianapolis, etc., v. Gaston*, 58 Ind. 224), are also essential factors. Bodily pain, too, is to be considered and compensated for; and so much of mental suffering as may be indivisibly connected with it, but mental anguish and agony cannot be measured by money—the courts consider—and there is no established rule authoritatively commanding such a futile effort. *Johnson v. Wills*, 6 Nev. 254. It is difficult to measure even excessive pain against money. *Campbell v. Portland Sugar Company*, 62 Me. 552; *Redfield on Railways*,

Vol. II. p. 286. In fact, they say that one should get compensated for all injuries that are the legal, direct and necessary results of the accident. *Curtis v. Rochester & S. Ry.*, 20 Barb. 282. Loss of anticipated profits from real estate on land was held a proper subject for compensation to a land speculator. *Penn. Ry. v. Dole*, 70 Penn. St. 47. Disfigurement was also held a proper point to be considered. *The Oriflamme*, 3 Sawyer, 397.

The late case of *Phillips v. The South Western Railway Company* fully enunciates what, in the estimation of the English judges, are to be considered in fixing the amount of damages. Cockburn, C. J., on a motion for a new trial for insufficiency of damages, said that the heads of damages were the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure; the pecuniary loss sustained through inability to attend to a profession or business; as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life. *L. R.*, 4 Q. B. D. 407.

In the Common Pleas Division on a motion, after a second trial, to set aside the verdict for excessive damages, Grove, J., said, "The plaintiff is entitled to receive at the hands of the jury, compensation for the pain and bodily suffering which he has undergone for the expense he has been put to for medical and other necessary attendance, and for such pecuniary loss as the jury (having regard to his ability and means of earning money by his profession at the time) may think him reasonably entitled to." "Damages are awarded as a compensation for the injury and loss sustained; they are not to be given from motives of charity and compassion." Lopes, J., was of the same opinion. And in the Court of Appeal, Bramwell, L. J., said that he was, in common with other judges, accustomed to direct juries as follows: "You must give the plaintiff a compensation for his pecuniary loss, you must give him compensation for his pain and bodily suffering; of course, it is almost impossible to give an injured man what can be strictly called a compensation; but you must take a reasonable view of the case, and must consider under all the circumstances

what is a fair amount to be awarded to him." Cotton, L. J., remarked that a plaintiff is not to receive an annuity for the rest of his life calculated on the amount of his income; but that after taking into account the chances affecting the income, the jury are to say what, in their opinion, is a fair compensation for the disability, whether permanent or temporary, under which a plaintiff comes of practising his profession and earning the income which he previously enjoyed." L. R., 5 C. P. D. 280. In this case Phillips, who was a physician of middle age and robust health, making £5000 a year, was so injured for sixteen months, the time between the accident and the trial, he was totally incapable of attending to business; his health was irreparably injured to such a degree as to render life a burden and a source of utmost misery: he had undergone a great amount of pain and suffering, and the probability was that he would never recover. Yet, the first jury only gave him £7,000. This verdict was set aside as inadequate. The second jury awarded £16,000, and the court refused to consider it excessive. In fact, Bramwell, L. J., said that the only misgiving he had was whether the jury ought not to have given more. L. R., 5 C. P. D., p. 287.

RECENT DECISIONS AT QUEBEC.

Costs.—Lorsque l'avocat de l'une des parties demande, par sa déclaration ou par les plaidoyers, distraction de dépens, cette distraction suit, *of course*, le jugement rendu en faveur de sa partie pour les frais, quand même le projet du jugement, délivré au protonotaire, n'en ferait pas mention.

2. Dans ce cas, une entrée en marge du registre des jugements, faite subéquentement à l'enregistrement du dit jugement, pour y insérer la distraction de frais omise, ne sera pas considérée comme une altération du jugement.

3. Une demande pour distraction de frais contenue dans les pièces de procédure, devant la Cour Inférieure, donne droit à la distraction des frais de révision, sans demande spéciale à cet effet.—*Morency v. Fournier*, (C. R.), 7 Q. L. R. 9.

Action en réintégration.—The defendant, without the plaintiff's permission, took possession of a sugary which the plaintiff had worked as proprietor for 17 years next preceding, and persisted in holding the same against the plaintiff's

will. *Held*, that this constituted violence in the eye of the law, sufficient to support an action *en réintégration*.

The sugary in question was situated on a lot of land whereof the plaintiff was proprietor of the south half and the defendant, of the north half, there being no boundary line between the two half lots. *Held*, that the plaintiff having peaceably enjoyed his property for 17 years, was under no obligation to bring an action *en bornage*.—*Gerbeau v. Blais*, (C. R.), 7 Q. L. R. 13.

Municipal voter—Damages.—Le fait de priver illégalement une personne de l'exercice de son droit d'électeur municipal donne lieu à un recours en dommages intérêts. 2. L'officier public dont la conduite révèle mauvaise foi dans l'exécution des devoirs de sa charge n'a pas droit à un mois d'avis avant l'institution de l'action en dommages.—*Benatchez v. Hamond* (C. C.), 7 Q. L. R. 25.

Délaissement.—Although the *délaissement* leaves the *délaisant* the right to resume the property at any time before the sale, on paying the plaintiff suing, and also the right to receive any surplus that the land may produce after payment of the legal claims, yet the *délaisant*, during the curatorship, has no control or administrative power in relation to the real estate so *délaissé*.

The defendant *délaisant* cannot be considered a *légitime contradicteur* in any proceeding to bring the property to sale, and a creditor having a judgment against the *délaisant* ought to cause it to be declared executory against the curator before causing the real estate *délaissé* to be seized.—*Couture v. Fournier* (C. R.), 7 Q. L. R. 27.

Common Carrier.—Le propriétaire d'une ligne de transport, par bateaux à vapeur, n'est pas responsable des accidents qui peuvent arriver par suite du mauvais état du quai dont il fait usage pour sa ligne, lorsque ce quai est public.

2. Sa responsabilité comme *common carrier* cesse, dans tous les cas, du moment que le consignataire a été mis en possession des effets à lui consignés, au lieu de destination.—*Leclerc v. Gaherty*, (C. C.) 7 Q. L. R. 30.

Accession — Workmanship.—The owner of standing trees which have been cut down and converted into cord-wood by a person in good

faith, cannot revendicate the cord-wood, if the value of the work bestowed in making it greatly exceeds the value of the trees; and he can only claim the value of the trees when standing, if, moreover, he has suffered no damage beyond that value.—*Hall v. Hould*, (S. C.) 7 Q. L. R. 31.

Proceedings in formâ pauperis.—Les officiers de justice n'ont pas d'action pour leurs services contre les parties poursuivant ou défendant in *formâ pauperis*, qui ont succombé, mais ils ont droit à leurs déboursés, et le montant qu'accorde le tarif pour transport est un déboursé dont ils peuvent poursuivre le recouvrement.—*Dion v. Toussaint* (C. C.), 7 Q. L. R. 54.

Tutor—Witness.—Le tuteur plaident en nom qualifié pour son pupille est témoin compétent pour ce dernier, et sa crédibilité peut seule être affectée par sa position dans l'instance.—*Thompson et al. v. Pelletier*, (S. C.), 7 Q. L. R. 59.

RECENT ENGLISH DECISIONS.

Slander—Privilege.—To an action for slander the defendant stated in defence that the words were spoken upon his examination on oath before a select committee of the House of Commons, which had been appointed by the House to inquire and report upon certain circumstances connected with the plaintiff, power being given to the committee to send for persons, papers and records. *Held*, on demurrer, that this was a good answer to the action.—*Seaman v. Netherclift*, L. R., 2 C. P. Div. 53; *Dawkins v. Lord Rokeby*, L. R., 7 H. L. 744. Q. B. Div., Feb. 25, 1881. *Goffen v. Donnelly*. Opinions by Field and Manisty, JJ., 44 L. T. Rep. (N. 8.) 141.

International Law—Jurisdiction over Foreign Sovereign.—A foreign Sovereign or State is exempted by international law, founded upon the comity of nations, from the jurisdiction of the tribunals of this country, and therefore an action is not maintainable in our courts against a foreign sovereign or state. The only exceptions to this rule are; 1. Where a foreign sovereign or State has waived the privilege he possesses, and has come into the municipal courts of this country to obtain relief, in which case the defendant may assert any claim he has by way of cross-action or counterclaim to the original action, in order that justice may be done. 2. Where there are moneys in the hands

of third parties within the jurisdiction of the English courts, to which a claim is set up by a foreign sovereign, notice of an action against the third parties in relation to those moneys may be given to the foreign sovereign, that he may have an opportunity of putting forward his claim. Ct. of App., Nov. 17, 1880. *Strousberg v. Republic of Costa Rica*. Opinion by Jessel, M. R., James & Lush L. JJ. 44 L. T. Rep. (N.S.) 199.

GENERAL NOTES.

Lord Justice James died June 7, aged 74 years.

CHIEF JUSTICES OF ENGLAND.—The following is a list of Lords Chief Justices of the King's and Queen's Bench since 1756: Lord Mansfield, from 1756 to 1788, 32 years; Lord Kenyon, from 1788 to 1802, 14 years; Lord Ellenborough, from 1802 to 1818, 16 years; Lord Tenterden, from 1818 to 1832, 14 years; Lord Denman, from 1832 to 1851, 19 years, and the Right Hon. Sir Alexander Cockburn, Bart. G. C. B., recently deceased, from 1859 to 1880, 21 years.

The General Council of the Bar of the Province of Quebec met in Montreal on the 14th ult. All the members were present:—W. W. Robertson, Batonnier of the Montreal section; the Hon. J. G. Malhiot, Batonnier of the Three Rivers section; Joseph G. Bossé, Batonnier of the Quebec section; William White, Batonnier of the St. Francis section; and C. T. Suzor, of Quebec, the Secretary-Treasurer. W. W. Robertson, Esq., was elected Batonnier-General of the Province for the ensuing year, and C. T. Suzor, Esq., was re-elected Secretary-Treasurer. The bill now before the Legislature to amend the charter of the corporation was the chief subject of discussion, and after considering its more important features, the Council adjourned its session to meet in Quebec on the following Tuesday morning, on which day the bill was to come before a select committee of the House of Assembly.

DISRAELI.—In the general grief at the death of Lord Beaconsfield, lawyers will not forget that he entered upon the business of life as a lawyer. Like the rest of the early history of Mr. Disraeli, little is known with certainty of his career in the law, except that it was short. He is believed to have been articled to a solicitor in Old Jewry; but what was the name of his principal, and how he came to leave the law, is without even a tradition. His disciples in the legal profession may well have found internal evidence of an acquaintance with legal processes. Mr. Disraeli's statements of the law were always precise and singularly accurate; while he had a remarkable facility for taking in the effect of proposed legislation, however complicated. His appreciation of the legal bearings of political questions was sound; and his presence in the House of Commons at the time of the Bradlaugh incident would probably have saved the House from a ridiculous situation.—*London Law Journal*.

The Legal News.

Vol. IV.

JUNE 18, 1881.

No. 25.

EX-JUDGES RESUMING PRACTICE.

The *Canadian Law Times* criticizes at some length the sudden withdrawal of Vice-Chancellor Blake from the bench, and remarks that a doubt has been freely expressed as to the right of a retired judge to practice at the bar. "Members of the Law Society of Upper Canada," observes our contemporary, "acquire, by admission thereto, a statutory status therein. The judges of the Superior Courts of Common Law and the Court of Chancery acquire a statutory status with reference to the Law Society upon acceptance of their commissions, and, as visitors of the Society, are, we presume, no longer members thereof, as they cannot occupy both the positions of visitors and visited. Once having ceased to be a member of the Law Society by becoming a visitor thereof, can a judge, on retiring, again become a member of the Law Society, without undergoing the usual course prescribed for admission?"

The same journal states that another question arises, assuming the right of ex-judges to practice at the bar, as to their right to retain the rank and precedence of a Queen's counsel in the Courts. "The appointment of a Queen's Counsel is a special retainer of counsel by the Crown. Upon acceptance of a Judge's commission by one of Her Majesty's counsel, the retainer must, perforce, cease, inasmuch as a judge has to determine causes between Her Majesty and her subjects. If, therefore, a judge retires from the bench and re-enters active practice, must he not receive a fresh retainer from the Crown before acting as one of Her Majesty's counsel?"

It appears that there has been but one precedent in Ontario for M. Blake's proceeding—the case of Mr. Mowat; but in the Province of Quebec, several retired judges, though in the receipt of pensions, have resumed practice, chiefly as chamber counsel, however. The dignity of Q. C. has also been sometimes resumed. We have before us an opinion, signed by two eminent ex-judges, in which it is not assumed, but this opinion was given to a

private individual, and probably there is no significance in the omission.

JUDICIAL REMUNERATION.

With respect to the letter of an English barrister on this subject, quoted *ante*, p. 161, the *Albany Law Journal* says that the writer, being a foreigner, has fallen into the natural error of not distinguishing between federal judges, like Judge Choate, and the State judges. "The latter have for eleven years received \$7,000 salary, and have an allowance for expenses, of \$2,000; while, in the city of New York, their salary is more than twice the former sum. Their term of office is fourteen years."

These rates correspond nearly with the remuneration of our Supreme Court judges, and show that the New York judiciary are far from being the worst paid judicial officers. The table published on p. 188 exhibits several remarkable inequalities, (some of the salaries being as low as \$2,000), but the apparent inadequacy of the remuneration in these instances may be susceptible of explanation.

PERIODICALS.

Some of the English judges have been embarrassed by the question whether a newspaper is a periodical. The *London Times* published a biographical notice of Lord Beaconsfield, which was pirated and reprinted at the price of one penny. The English Copyright Act provides that the proprietor of copyright in any "encyclopædia, review, magazine, periodical work, or other work published in a series of books or parts," shall be entitled to all the benefits of registration upon registering such work in pursuance of the Act. The *Times* is not registered under the Act, and the Master of the Rolls has held that the journal in question, being a periodical work within the meaning of the Statute, the proprietors were not entitled to the protection of the law without compliance with the formality of registration. It appears that this decision is at variance with one rendered some years ago by Vice-Chancellor Malins, and an appeal has, therefore, been taken to a higher Court.

The English bar examinations are becoming a serious test of fitness. At the last examination, 42 out of 102 aspirants are said to have been rejected.

NOTES OF CASES.

SUPREME COURT OF CANADA.

OTTAWA, April, 1881.

COSGRAVE v. BOYLE.

Promissory Note—Death of Endorser—Notice of dishonor.

The appellants discounted a note, made by P. and endorsed by S., in the Canadian Bank of Commerce. S. died, leaving the respondent his executor, who proved the will before the note matured. The note fell due on the 8th May, 1879, and was protested for non-payment; and the Bank, being unaware of the death of S., addressed a notice of protest to S. at Toronto, where the note was dated, (under 37 Vict. c. 47, s. 11, D). The appellants, who knew of S.'s death before maturity of the note, subsequently took up the note from the Bank and sued the defendant, relying upon the notice of dishonor given by the Bank, and without having given any other notice.

Held, reversing the judgment of the Court of Appeal for Ontario, that the holders of the note sued upon, when it matured, had given a good and sufficient notice to bind the defendant, and that the notice so given ensured to the benefit of the appellants.

O'Sullivan for appellants.*McMichael, Q. C.*, for respondent.

SUMMERS v. THE COMMERCIAL UNION ASSURANCE CO.

Interim Receipt—Agent, powers of—Broker cannot bind the Company.

This was an action brought on an interim receipt, signed by one D. Smith, as agent for the respondent company at London, Ontario. One of the pleas was that Smith was not respondent's duly authorized agent, as alleged. The general managers of the Company for the Province of Ontario had appointed, by a letter, signed by them both, one Williams, as general agent for the city of London. Smith, the person by whom the interim receipt in the present case was signed, was employed by Williams to solicit applications, but had no authority from or correspondence with the head office of the company.

In his evidence, Smith said he was authorized by Williams to sign interim receipts, and the jury found he was so authorized. He also

stated that one of the general managers was informed that he (Smith) issued interim receipts, and that the former said he was to be considered as Williams' agent. There was no evidence that the other general manager knew what capacity Smith was acting in.

Held, affirming the judgment of the Court of Appeal for Ontario; that Williams had no authority to bind the respondent company.

H. Cameron, Q. C. (with him *Bartram*), for appellant.*Robinson, Q. C.*, (with him *W. N. Miller*), for respondents.

RAY et al. v. LOCKHART et al.

Will, Construction of—Surplus—Residuary personal estate.

Among other bequests the testator declared as follows:—"I bequeath to the Worn-out Preachers' and Widows' Fund in connection with the Wesleyan Conference here, the sum of \$1,250, to be paid out of the moneys due me by Robert Chestnut, of Fredericton. I bequeath to the Bible Society £100. I bequeath to the Wesleyan Missionary Society in connection with the Conference, the sum of \$1,500." Then follow other and numerous bequests. The last clause of the will is:—"Should there be any surplus or deficiency, a *pro rata* addition or deduction, as may be, to be made to the following bequests, namely, the Worn-out Preachers' and Widows' Fund, Wesleyan Missionary Society, Bible Society." When the estate came to be wound up, it was found that there was a very large surplus of personal estate, after paying all annuities and bequests. This surplus was claimed, on the one hand under the will by the above-named charitable institutions, and on the other hand by the heirs-at-law and next of kin of the testator, as being residuary estate, undisposed of under his will.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the "surplus" had reference to the testator's personal estate, out of which the annuities and legacies were payable; and, therefore, a *pro rata* addition should be made to the three above-named bequests, Statutes of mortmain not being in force in New Brunswick.

Carker, Q. C. (with him *Sturdee*), for appellants.*Kaye, Q. C.*, (with him *Stockton*), for respondents.

PRIVY COUNCIL.

March 22, 1881.

Present: SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH.

RENNY et al. v. MOAT.

Subrogation.

The following is the judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Renny and others v. Moat, from the Court of Queen's Bench for Lower Canada, in the Province of Quebec; delivered 22nd March 1881. (See 2 Legal News, p. 97, for judgment of the Court of Queen's Bench.)

PER CURIAM. This is an appeal admitted by special leave of Her Majesty in Council, from a judgment of the Court of Queen's Bench for Lower Canada, dated the 22nd of March 1879, whereby a judgment of the Superior Court, sitting in Review, dated the 31st of October 1878, was affirmed on appeal.

The Appellants were the Inspectors appointed under the provisions of the Canadian Insolvent Act of 1875, of the estate of William Patrick Bartley, an insolvent.

The Respondent, Robert Mowat, was a claimant against the estate, and by his claim stated that the insolvent was indebted to him in the sum of \$22,950.45, and interest, from the 17th day of March 1876, at the rate of seven per cent., being the amount of an obligation executed by the insolvent in favour of Robert Hamilton, on the 20th March 1871, before Hunter, notary public, and transferred to him by deed of the 23rd June 1877.

The claimant further stated that he held as security for his claim a transfer and subrogation of a mortgage made by the said William Patrick Bartley in favour of the said Robert Hamilton, which said transfer was passed before the said notary, on the 23rd June 1877.

The obligation and mortgage to which the claim referred were created by a deed of the 17th March 1876, by which Bartley, the insolvent, acknowledged to have received from Hamilton the sum of \$20,000, and promised to pay the same to him in five years from the date thereof, with interest thereon at the rate of seven per cent. per annum, from the 17th March 1871, payable half yearly, on the

17th of March and the 17th of September in each year, the first payment thereof to be made on the 17th day of September 1871, and by which deed Bartley mortgaged and hypothecated certain lands therein mentioned as security for the payment of the principal sum of \$20,000 and interest at the times therein mentioned. By the same deed, the members of the firm of Mulholland & Baker became bail and security for Bartley to Hamilton for the due, faithful, and punctual payment of the said sum of \$20,000 and interest at the times in the deed mentioned.

The appellants contested the claim of the respondent, and alleged that of the sum of \$20,000, referred to in the deed of obligation, the sum of \$9,570.20 was not paid to Bartley by Hamilton, but that the same was deposited (according to an understanding existing between the said parties at the time) in the Merchants' Bank of Canada, to the credit of Bartley, "subject to approval of Robert Hamilton."

That the total amount of indebtedness to Hamilton under the deed of obligation, on the 17th day of March 1876, for principal and interest, was the sum of \$20,700.07, which was paid to him on that day in two separate amounts—namely, the sum of \$9,087 advanced for that purpose by the claimant, and the sum of \$11,613.07, being the amount of the said deposit in the said bank by means of the check of Bartley, and delivered over to Hamilton.

That the only amount advanced by the claimant, in connection with the payment of the said obligation, was the said sum of \$9,087; the balance of said mortgage being paid by the insolvent himself, with the funds so deposited as aforesaid at his credit in the said bank.

That, having so paid the said sum of \$9,087 the claimant was by law entitled to be subrogated in all the rights of Hamilton, under the deed of obligation, to the extent of the amount so paid, and the interest to accrue thereon at the rate in the deed stated, and no more. That with a view to securing such subrogation the deed of the 23rd day of June 1877, in the said claim referred to was executed, but in and by the said deed, the parties thereto did falsely and erroneously declare that the total amount of the said obligation had been really paid by the claimant, whereas in truth and in fact he had only paid the said sum of \$9,087.

That the deed of the 23rd day of June 1877, was not a deed of transfer from Hamilton to the claimant, but a mere deed of subrogation by the creditor to the claimant, a third party, in terms of Article 1155 of the Civil Code of Lower Canada, and did not and could not legally operate as a deed of subrogation beyond the amount so paid by the claimant, the remainder of the debt due to the creditor having been actually paid to him, as aforesaid, by the debtor himself (the said insolvent), out of funds at his own credit in said bank, and in no way lent or advanced by the claimant.

Wherefore the inspectors prayed, that by the judgment to be rendered on the contestation, it be declared and adjudged that the rights of the claimant, under the deed of subrogation of the 23rd day of June 1877, were limited and restricted to the sum of \$9,087, and interest thereon at the rate of seven per centum per annum from the said 17th day of March 1876, and that the claim be reduced to that amount and interest, and, as regards the excess beyond that amount and interest, be dismissed with costs.

The case was heard in the Superior Court in first instance, by the Honorable Mr. Justice Mackay, who allowed the claim to the extent of only \$9,087, and interest thereon at the rate of seven per cent. per annum, from the 17th of March, 1876, and maintained the contestation as to the residue of the claim. That judgment, so far as it related to the whole of the claim, beyond the \$9,087 and interest, was reversed by a majority of the Judges of the Court of Review, one of the Judges, Mr. Justice Dunkin, dissenting. The judgment of the Court of Review was affirmed on appeal by the Court of Queen's Bench, the majority, consisting of the Chief Justice and Justices Monk and Ramsay, being in support of the affirmance, and Justices Tessler and Cross dissenting.

The sum of \$22,950.45, which formed the subject of the claim, consisted of the sum of \$20,700.07, which were paid to Hamilton on the 17th of March, 1876, for principal and interest, and \$2,250 and some odd cents, on account of moneys which had been previously paid by Mulholland & Baker, as Bartley's sureties, to Hamilton, in discharge of former instalments of interest.

It was objected, on the argument of this

appeal, that the \$2,250 odd had been repaid to Mulholland & Baker, and a credit which was given on the 27th of March, 1876, by Mulholland & Baker in account with Bartley & Co., not with Bartley alone, was referred to (*See Record*, p. 41.)

The short extracts from the accounts set out at p. 34 of the *Record*, and of which the dates of most of the entries are long after the date of the 17th of March 1876, are scarcely intelligible as they stand. It is, however, clear that it was never contended in the Courts below that the \$2,250 had been repaid to Mulholland & Baker, and in the deed of transfer of the 23rd of June, 1877, to which reference will be made, the amount was admitted by Bartley to be due. It was admitted in the Appellant's *factum* in the Court of Queen's Bench, p. 66, para. 2, that Mulholland & Baker had paid \$2,100 on account of the instalments of interest due on the 17th September 1874, the 17th March 1875, and the 17th September, 1875, and there was no contention that they had been repaid. The \$2,250 were allowed both by the Court of Review and by the Court of Queen's Bench, and their Lordships are of opinion that there is no ground for the contention that they were repaid. Even the learned Judge of the Queen's Bench who dissented as to the \$11,613 was of opinion that the \$2,250 ought to be allowed.

There is not the slightest ground for contending, nor indeed was it contended, before their Lordships that Moat, the claimant, had himself paid to Hamilton any part of the debt due under the mortgage, although he advanced to Mulholland & Baker the \$9,087 with which that portion of the debt was paid off by them. It is clear, therefore, that Moat was not subrogated to the rights of Hamilton by a conventional subrogation within the meaning of Art. 1155 of the Civil Code of Lower Canada. The only substantial question in this appeal is whether the sum of \$11,613.07, part of the sum of \$20,700.07 paid to Hamilton on the 17th of March, 1876, in discharge of the mortgage, was paid by Mulholland & Baker as the agents of Bartley, the insolvent, or on their own account, in discharge of the obligation under which they had become bound to Hamilton as sureties for Bartley. Upon that question of fact there are the concurrent judgments of the Court of Review and of the Court of Queen's Bench that the

payment was made by Mulholland & Baker on their own account. Their Lordships, acting upon the sound rule by which they are usually guided in such cases, would not interfere with that finding, unless some error or miscarriage of justice were manifest. So far from that being the case, their Lordships, having carefully considered all the documents and evidence, are satisfied that the majority of the Judges, both in the Court of Review and in the Court of Queen's Bench, arrived at a just and correct conclusion. Independently of the recitals in the deed of the 23rd June 1877, there is ample evidence to warrant it.

It is true, as alleged in the contestation, that of the sum of \$20,000 mentioned in the deed of obligation and mortgage, \$9,570 were deposited in the Merchants' Bank of Canada to the credit of the insolvent, subject to the approval of Hamilton; it is also a fact that of the \$20,700 paid to Hamilton, on the 17th March 1876, on account of principal and interest, \$11,613.07 were paid by a cheque for that amount, drawn by the insolvent on the Merchants' Bank of Canada against the sum of \$9,570 so deposited to his credit, as above mentioned, and the interest which had accumulated thereon. That cheque was drawn by the insolvent in the office of Mulholland and Baker. It was made payable to Jackson Rae or order for Robert Hamilton, and was handed to Mulholland & Baker by the insolvent, he being at that time indebted to them in a much larger amount. They handed the cheque to Rae, who was the manager of the Bank, and acted in the transaction as the agent of Hamilton (Record, p. 53), and Rae gave them a receipt for the cheque, by which he acknowledged that he had received it from them to be applied in discharge of the mortgage, and it was so applied. There is nothing in the evidence to lead to the conclusion that Mulholland & Baker received the cheque from Bartley as his agents, or that they, as his agents, paid it to Rae for Hamilton. There was only one receipt for the cheque for the \$11,613.07, and the cheque for the \$9,087 which was paid by Mulholland & Baker to Rae at the same time, and which, beyond all dispute, was Mulholland & Baker's own cheque, and the same words were used in the receipt with reference to both cheques (Record, p. 6 D. 1). It was contended that, as the cheque drawn by Bartley was made

payable to Rae, or order, for Hamilton (Record p. 82), Barclay could not transfer it to Mulholland & Baker without Rae's endorsement, and it was not so endorsed at the time when it was handed over to them. It does not appear when it was endorsed. The insolvent, no doubt, knew that Mulholland & Baker were going to use it in discharge of their liability as sureties to Hamilton, and neither he nor they could have doubted that Hamilton, in the exercise of his control over the money in the bank, would consent to its being so used. The form of the cheque is not decisive of the question whether Bartley handed it to Mulholland and Baker, as his agents, for the purpose of paying it to Hamilton on his behalf, or to Mulholland & Baker on their own account in part discharge of the larger amount due from him to them.

If Bartley had intended that the cheque should be applied on his behalf in paying the debt for which he was liable as principal, and not by Mulholland and Baker, on their own account, in discharge of their obligation as sureties, there was no necessity for his handing the cheque to Mulholland & Baker. It was manifestly the intention of both parties that the mortgage should be kept alive, and they must have known that if the \$11,613.07 were paid with Bartley's money, the debt would have been discharged *pro tanto*, and the mortgage subrogated and kept alive only for that portion which was paid by Mulholland & Baker. Besides, if Bartley intended to discharge the mortgage to the extent of the \$11,613.07, it would have been only reasonable that he should have required some discharge from the mortgage debt beyond the mere receipt given by Rae to Mulholland & Baker, but no such discharge was ever required by or given to him. If, on the other hand, Mulholland & Baker paid the cheque in discharge of their liability as sureties, the mortgage was not discharged, but they were at once subrogated to the rights of Hamilton by Article 1166 of the Code, and required nothing more than a receipt for the money. Further, Bartley was credited in the books of Mulholland & Baker with the \$11,613.07. It was contended that that was not done until a day or two after the cheque was handed to them, and then only under the advice of Mr. Abbott, their solicitor. The entries were, however, shown to Bartley, and there can be no

doubt that he assented to and ratified what had been done. Mr. Baker in his evidence stated that Bartley was perfectly aware that the entries were made or intended to be made in their books, that the whole matter was discussed with him, that the intention was that Hamilton was to be paid off by Mulholland and Baker, and that they were to be subrogated in all Hamilton's rights which were to be kept alive. Besides all this evidence there is the recital in the deed of June 1877. It is there said, "And whereas the said parties of the second part" (that is, Mulholland and Baker) "as such sureties have at divers times paid instalments of the interest on the said debt, and finally paid the entire principal thereof to the said party of the first part," (that is Hamilton,) "upon the agreement, and with the understanding that they should receive a subrogation of his rights under the said deed." Bartley personally intervened and signed that deed, and declared and acknowledged himself content and satisfied therewith, and to have been well and sufficiently signified in the premises. All this was done and passed in the office and in the presence of Hunter, a public notary, who signed the deed, and certified that the same had been duly read in his presence. The deed seems to have been an authentic document within the meaning of Article 1207 of the Civil Code, and not having been contradicted or set aside as false upon an improbation, it may be a question whether, according to Article 1210 of the Civil Code, it did not make complete proof between the parties to it and their legal representatives of the facts mentioned in the recital. It is not necessary to hold that it amounted to complete proof. It is sufficient to say that it was strong evidence against Bartley, and in the absence of fraud or collusion, of which there was no suggestion or proof, it was also evidence against the appellants. There was no evidence to show that Bartley was insolvent at the time when he intervened and signed the deed, or that at that time any of the debts due by him at the time he became insolvent had been contracted.

It was contended that any admission made by Bartley after the mortgage was paid off could not affect the question of subrogation, and that if the \$11,613.07 were really paid by him and not by Mulholland and Baker, no sub-

sequent admission or ratification by him could convert a discharge into a subrogation. That contention may be admitted to be correct, upon the hypothesis that the amount was really paid by him; but his admissions, made without fraud or collusion, before he became insolvent, are evidence against him and the inspectors of the estate of what the real transaction was at the time when it took place.

Their Lordships concur with the majority of the Judges of the Court of Review and of those of the Queen's Bench, that the cheque was made over by the insolvent to Mulholland and Baker towards the discharge of a larger amount due from him to them, and that the cheque having become their property, they applied it in discharge of the liability which they, as sureties for the insolvent, had contracted with Hamilton.

Their Lordships are clearly of opinion that the deed of 23rd June 1877 operated as a transfer to the Respondent of the rights to which Mulholland and Baker were entitled under the subrogation, and that it vested in him the right to the principal sum of \$20,700 paid on the 17th of March 1876 by Mulholland and Baker to Hamilton for principal and interest, and to the sum of \$2,250 due on account of the instalments of interest previously paid by them, the two sums making together the sum of \$22,950.

For the reasons above given, their Lordships are of opinion that the Court of Review was right in rejecting the contestation, and that the Court of Queen's Bench was right in affirming the judgment of the Court of Review.

They will, therefore, humbly advise Her Majesty to affirm the judgment of the Court of Queen's Bench, and to order that the claim of the Respondent be admitted for the full amount of \$22,950, and interest as claimed.

The Appellants must pay the costs of this appeal.

COURT OF QUEEN'S BENCH.

MONTREAL, June 14, 1881.

DORION, C.J., MONK, RAMSAY, TESSIER, and CROSS, JJ.

REGINA V. KAYLOE.

Abduction—Proof of Woman's Interest in Property—32-33 Vict. c. 20, s. 54.

Verbal evidence of an interest in property generally will not sustain an indictment under 32-33 Vict. c. 20, s. 54, which sets forth the abducted person's interest in a particular property.

It is not necessary, on an indictment under the second disposition of s. 54, to establish the prisoner's knowledge of the woman's interest.

RANSAY, J. This is a reserved case from the Court of Queen's Bench, sitting in the district of Iberville. The prisoner was indicted for that he "did feloniously and fraudulently allure, take away and detain one Louise Dupuis out of the possession and against the will of Joseph Jean-Baptiste Dupuis, her father; he, the said Joseph Jean-Baptiste Dupuis, having then the lawful care and charge of the said Louise Dupuis, she, the said Louise Dupuis, then being under the age of twenty-one years, and having a certain, legal, absolute and present right and interest in the following described property." Then follows the description of the property it is alleged the said Louise Dupuis held under a certain deed; and the indictment concludes thus:—"With intent her, the said Louise Dupuis, to carnally know, against the form," &c.

The indictment is under section 54, 32-33 Vict., cap. 20.

The prosecution attempted to prove the interest of Louise Dupuis in the property described, by a notarial copy of the deed mentioned in the indictment. Objection was taken to this, and the Judge maintained the objection. The prosecution then proceeded to prove generally by witnesses that she had an interest worth \$10,000 in property.

The prisoner was convicted, and the judge reserved the following questions for the consideration of this Court:

1st. Was the verbal testimony to which objection was made allowable and sufficient to sustain the indictment in that respect?

2nd. Is the indictment sustained without evidence of the prisoner's knowledge that Miss Dupuis was an heiress?

I am inclined to think that the indictment should set forth the interest of the woman in the property. It is a substantial fact which the prisoner has a right to rebut. He cannot do this unless he is told what the interest is. But it is not absolutely necessary for the court to

decide that question here, for there can be no doubt that when the interest is set forth in the indictment, as it is in this case, the prosecution must prove it as laid. The verbal evidence of an interest in property generally cannot sustain this indictment. We do not decide, let it be observed, that verbal evidence of interest cannot be given. That is not the question submitted, and it is evident that there might be an interest which could only be proved by parol.

On the second point reserved, I think it was not necessary for the prosecution to prove the knowledge of the prisoner as to the interest of Louise Dupuis. The distinction referred to by the counsel for the Crown is made very clear by reference to the Statute. There are two categories established by section 54. First, there is the case of a woman possessing property, of any age, abducted "from motives of lucre." If the prisoner had been indicted for this offence, it would have been necessary to establish the motive, and to do this some proof of knowledge on his part, or at all events belief, probably would be required. *R. v. Barratt*, 9 C. & P. 387. But in an indictment under the second disposition of the section (the present case,) it is not necessary that there should be any motive; the intent to carnally know, or to marry, or to cause to be, etc., is all that is required to make up the offence.

On the first point, then, we are of opinion that the conviction is bad, and the prisoner should be discharged.

Conviction quashed.

Mercier, for the Crown.

Carter, Q.C., for the prisoner.

IN CHANCERY, ONTARIO.

Warehouseman—Warehouse Receipt—Acquisition by Bank directly—Power of Federal Parliament—Mixture.—W. S., a member of a firm engaged in the business of buying and selling coal, was lessee of a wharf, where the coal belonging to his firm was stored. Other articles had been stored there.

Held, that he was sufficiently qualified, under 34 Vict. cap. 5, p. 46, to give a warehouse receipt upon such coal.

Under 22 Vict. c. 20, a warehouse receipt could be taken by a bank by endorsement

only; but by 34 Vict. c. 5 (D), a bank may take one directly.

The provisions of 34 Vict. c. 5, relating to warehouse receipts, do not invade the functions of the Provincial legislature, by an interference with "property and civil rights" in the Province.

Two of the warehouse receipts stated that the coal was in sheds, and two others that it was in bins, "separate from, and will be kept distinguishable from other coal." Other coal was received during the year, and was mixed with the coal under warehouse receipt. The quantity in store, at the time of the firm's insolvency, was less than the quantity there at the time of the receipt.

Held, that the plaintiff, the assignee in insolvency, could be in no better position than the insolvent as against the bank, and that the Bank was entitled to any coal of the description specified in the warehouse receipts that might be found in the warehouse.—*Smith v. The Merchants' Bank*, (May 21, 1881.)

RECENT CRIMINAL DECISIONS.

Burglary—Intent alleged must be proved.—The indictment charged that the defendant broke and entered a certain building belonging to the Warren Institution for savings, "with intent then and therein to commit the crime of larceny, and the property, goods and chattels of the said Corporation in said building then being found, then and there in said building, feloniously to steal, take and carry away." At the trial the evidence was that defendant broke and entered the basement of the building in question, and worked his way into part of the first story, occupied by the United States for a post-office; and that the sole intent of the defendant was to steal some postage-stamps belonging to the United States. *Held*, (by the Massachusetts Supreme Judicial Court) that there was a fatal variance between the indictment and the proof. The intent with which the defendant broke and entered the building is an essential element of the crime, and must therefore be alleged in the indictment, and must be proved as laid. A charge of breaking and entering with intent to steal the goods of one person is not supported by proof of breaking and entering with intent to steal the goods

of another. *Jenk's case*, 2 East's P.C. 514—*Commonwealth of Massachusetts v. Moore*, 23 Alb. L. J. 298.

GENERAL NOTES.

There are fourteen judges of English County Courts whose united ages amount to 1,065 years, with an average of 76 years. Of these, five were appointed judges in 1847, on the passing of the first County Court act: they will, therefore, complete thirty-four years' service this year—more than twice the time required for a judge of the high court to earn his retirement. These venerable gentlemen can only receive a pension on being "afflicted with some permanent infirmity disabling them from the due execution of their office."—*Ohio Law Journal*.

W. M. SEWARD'S FIRST CASE.—Mr. Seward, in his Autobiography, gives the following account of his first case in court:—"My *début* at Auburn obtained for me a reputation which, though I was thankful for it at the time, I had no reason to be proud of. A convict discharged from the State Prison there in the morning was warned to leave the town immediately. Reaching the suburb, he discovered an open door, entered it, and proceeded to rifle a bureau. Taking alarm, he rushed out, carrying with him only a few valueless rags. He was indicted for this petty larceny, which, being a second offence, was punishable with a new term in the State Prison. I was assigned by the court to the defence of the unfortunate wretch. The theft and the detection were completely proved. The stolen articles lay on the table. The indictment described them as 'one quilted holder of the value of six cents,' and 'one piece of calico of the value of six cents.' I called upon a tailor as an expert, who testified that the holder was sewed, not 'quilted,' and that the other article was white jean, and not 'calico' at all. The bystanders showed deep interest in the argument which the defence produced, and were gratified when they found that the culprit escaped a punishment which they thought would be too severe for the transgression."

In the Queen's Bench division recently, says the *London Times*, the time of the Court was largely occupied at the instance of a solicitor who appeared in person to protest against disallowance on taxation of certain items in a bill of costs to recover which he had brought an action against a former client. The items in dispute were of the most trifling character, but, notwithstanding the patience and consideration of the Court, nearly the whole morning was consumed in a desultory and somewhat irregular argument. Ultimately, after the matter had been disposed of, and during the progress of a fresh case, the solicitor in question rose again to address the Court. Mr. Justice Denman desired him to sit down. The appellant, however, persisted, complaining that he had been ill-treated, whereupon Mr. Justice Denman warned him that if he persevered in his contempt he should be obliged to send him to prison. "Send me to prison, my Lord?" said the solicitor, defiantly. "Then the sooner the better." Mr. Justice Denman—"No, I shall not send you to prison, but I fine you £5, and if you do not immediately leave the Court the fine will be increased." The solicitor then withdrew, and the business before the Court was proceeded with.

The Legal News.

VOL. IV. JUNE 25, 1881. No. 26.

A LEGAL CURIOSITY.

We have been shown an old document which in several ways is interesting. It is a deed of sale of a farm, near St. Johns, dated 8th November 1765, made by Isaac Bureau dit St. Jean and Marie Angelique Girard, his wife, in favour of "Messieurs Gabriel Christie, Ecuier, Lieut.-Colonel et Quartier-Maitre Général des armées du Roy, et Moses Hazen, Ecuier, l'un des Juges de Paix de Sa Majesté dans le District de Montréal."

The first point noticeable about this deed is that while in the French language, and prepared by a French Notary, M. Simonnet, it is in original form,—not in the form of minute, yet not in what under the French form is termed *en brevet*, and that the two N. P.'s sign as witnesses. This form was probably adopted, the purchasers being English, because of the contention then insisted on by the English inhabitants, that in all matters English laws had supplanted those of France. The purchasers, accustomed to English ways, doubtless insisted on having something to show for their money, and were not content to leave that for which they paid, in custody of a notary.

The second point is that it bears the celebrated stamp, which figured so largely among the causes of the American Revolution. This is for 2½ sterling, and is an impressed or embossed stamp on the left hand top corner. The device consists of a heraldic rose displayed,—surrounded by the garter motto, surmounted by the crown,—above which is the word "America," while at the lower margin of the device is the amount, "II shillings VI pence." Another stamp in printer's ink indicates that the sheets were issued at "9 pence per quire."

This obnoxious Stamp Act was passed by the Imperial Parliament, on the 22nd March 1765, and came into force on the 1st November 1765, only eight days before the date of this deed. Both before the latter date and after it, the resistance to this system of taxation of the colonies by the home government was so sys-

tematic and strong, that the stamps were not allowed by the inhabitants to be issued in any of the American colonies, except Canada, Georgia, and the West India Islands. In some places, the stamped paper was seized and burned, in others, notably at Boston, the distributors were forced to resign their offices and ship the paper back to England. The Imperial Parliament yielded to the pressure of opinion and repealed the Act on the 17th March 1766, so that it was law for less than five months, and the field within which it really was allowed to have effect was very narrow. On this deed, then, we see one of the small number of these detested stamps which were used. From a return made to Parliament, it appeared that the Act had cost the Government for cutting stamps, for paper, stamping it, sending to America and expenses of distribution, £25,000, while the revenue received was about £1,300, got at the cost of the anger of the colonies. The first united action taken by the hitherto separate American colonies was in resistance to this Stamp Act. The first Congress of representatives from all the colonies, and since called the Stamp Act Congress, met at New York in 1765, to promote resistance to the act and its repeal.

The third point is as to the purchasers, whose original signatures appear. Colonel Christie, afterwards General Christie, was a well-known man in those days. He was in Canada officially as Quarter Master General, and afterwards as General for many years. He was one of those who embarked largely in the purchase of lands and seigniories from the French noblesse, who preferred to retire to France after the conquest. He acquired several seigniories in the neighbourhood of St. Johns, some of which still remain in the hands of his representatives.

Moses Hazen became a man of note on the invasion of Canada by the Americans, under Montgomery, in 1775. He apparently had come from the British Colonies, and when, in later years, the breach between the mother country and her colonies became war, he espoused the revolutionary side, (although, as appears by this deed, he had, in 1765, consented to use the hated stamped paper,) and on the arrival of Montgomery at St. Johns he raised a battalion of Canadian sympathisers with the

invasion, whom he led to Montreal, and then to the siege of Quebec by Montgomery and Arnold. He is repeatedly mentioned as an active Canadian on the Revolutionary side in the interesting narratives of Sanguinet and others, published by M. L'Abbé Verreau.

Deeds were then registered at Quebec in terms of an Ordinance of General Murray passed in 1764. This deed bears two certificates, showing a curious accuracy of detail, for the first certifies that the document had been "received into the register office in Quebec, on Monday, the 7th day of July 1766, at six o'clock in the afternoon," while the other certifies that it was "Registered in said office, on Wednesday, the 9th July 1766, at seven o'clock in the afternoon, on the French Register, Letter D, page 216." They are signed "J. Goldfrap, D. Reg'r." Mr. Goldfrap kept his office open later than the easy hour of 3, which is the present limit of Registrar's duty.

R. A. R.

NEW BOOKS.

THE LAW OF REGISTRATION OF TITLES IN ONTARIO, being an annotation of **THE REGISTRY ACT** (Revised Statutes of Ontario, cap. cxi), together with a collection of Practical Forms, Tariff of Fees, etc., by Edward Herbert Tiffany, of Osgoode Hall, Barrister-at-Law. Publishers, Carswell & Co., Toronto and Edinburgh.

The title of this work shows at once that it falls within the category of those which are in constant use in the practitioner's office, and which, if executed with conscientious regard to accuracy, prove so valuable. The Registry Act which Mr. Tiffany has undertaken to expound was passed in the year 1865, and, with the exception of a manual published in the following year by Mr. Woods, has not found an annotator. In the interval, many important decisions have been rendered by the Ontario Courts, bearing upon the construction and effect of the Act and the later Statutes referring to the subject, and it was desirable that these decisions should be collated and cited under the proper heads. The author has also examined the decisions of Quebec, Nova Scotia and New Brunswick, as well as those of the English and United States Courts, which are referred to where they are in point. Nearly a thousand cases are thus cited.

The work concludes with a collection of forms and other information indispensable to the conveyancer.

Although Mr. Tiffany's book is intended mainly for his professional brethren in Ontario, it nevertheless embraces much that is instructive to those who are studying the subject of registration. So far as the very limited examination we have been able to make of the work enables us to judge, the subject has been carefully and exhaustively treated, and Mr. Tiffany's commentary leaves little to be desired. We must add that the book has been excellently printed and bound, and reflects credit upon the enterprising law publishers, Messrs. Carswell & Co., to whom the profession is indebted for a long series of useful books.

ANATOMICAL STUDIES UPON BRAINS OF CRIMINALS:

A contribution to Anthropology, Medicine, Jurisprudence, and Psychology, by Moriz Benedikt, Professor at Vienna. Translated from the German by E. P. Fowler, M.D. Publishers, Wm. Wood & Company, Medical Publishers, 27 Great Jones street, New York.

Mr. Fowler, in this translation of Prof. Benedikt's investigations, has introduced to the notice of the medical and legal professions on this side of the Atlantic a curious and interesting treatise. How far those who examine the work may be disposed to agree with the somewhat startling corollaries of the learned author we are not prepared to say, but enough will be found in these pages to enlist the attention of the reader and gain respect for the investigator of a dark and abstruse subject.

The work opens with an explanation of the structure of the brain. It proceeds to give twenty-two observations of the brains of executed criminals, illustrated by photographs exhibiting the anatomical outlines of each case. Professor Benedikt believes that he has discovered certain defects in the cerebral constitution of these and other criminals, which indicate an inability on their part to restrain themselves from the repetition of a crime, notwithstanding a full appreciation of the superior power of the law. He is convinced that the "constitutional criminal is a burdened individual," with "the same relation to crime as his next blood kin, the epileptic, and his cousin the

idiot, have to their encephalopathic condition." He finds animal similarities in brains of low grade—similarities with the brain of the ape and the fox and beasts of prey generally. Such views, if shown to be well founded, could not fail to have an important bearing upon penal legislation. Prof. Benedikt does not pretend that he has yet been able to rise beyond the region of doubt and guess-work, but he modestly offers his present treatise as "a grain in the great sowing, of which the harvest shall be a true knowledge of the nature of man."

The translator, Dr. Fowler, has executed his part with zeal, and the publishers, Wm. Wood & Co., have added the agreeable accessories of clear typography and handsome binding. We commend the work to the attention of our readers.

PRINCIPLES OF THE LAW OF TORTS; or, Wrongs independent of Contract. First American, from the second English Edition; by Arthur Underhill, M.A., of Lincoln's Inn, Barrister-at-Law, assisted by Claude C. M. Plumptre, of the Middle Temple, Barrister-at-Law, with American cases, by Nathaniel C. Moak, Counsellor-at-Law. Publishers, William Gould & Son, Albany, N.Y.

An American edition of a work which has passed rapidly to the second edition in England will no doubt prove acceptable to the profession. The author has divided his subject into two parts, the first treating of torts in general, embracing six chapters, (1) of wrongs purely *ex delicto*; (2) of *quasi* torts; (3) of the liability of a master for his servants' torts; (4) of the limitation of actions *ex delicto*; (5) of the measure of damages in actions of tort; (6) of injunctions to restrain the continuance of torts. The second part treats of the rules relating to particular torts, and in this the author treats of defamation; of malicious prosecution; of false imprisonment and malicious arrest; of assault and battery; of bodily injuries caused by nuisances; of negligence; of adultery and seduction; of trespass to land and dispossession; of private nuisances affecting realty; of fraud and deceit; of trespass to and conversion of chattels; of infringements of trade marks and patent and copyright. The law is reduced to brief rules which are clearly stated, and the citations of cases include decisions up to date.

The American editor has had the assistance of Mr. John T. Cook in the preparation of the portions upon Trade-Marks, Copyrights and Patents, and extensive additions have been made to the original. The work, which comprises over 800 pages, is issued from the well-known Albany firm of William Gould & Son, and appears with all the advantages of type and binding which commend the publications of that house.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, June 20, 1881.

DORION, C.J., MONK, RAMSAY, TESSIER & BARY, JJ.

STEWART (def. below), Appellant, and BREWIS (plff. below), Respondent.

Contract made while ship is in peril—Salvage.

A steamship, carrying passengers and a valuable cargo, had lost her screw, and was in a dangerous position. Held, that an agreement to pay £800 sterling for towage into harbor was not exorbitant, and especially as the service, if treated as salvage, would have been worth the above sum.

The appeal was from a judgment of the Superior Court, Montreal, Mackay, J., reported in 3 L.N. 99.

The question was as to the validity of a contract to pay the sum of £800 sterling, for towing into Gaspé harbor a steamship, the Lake Champlain, the contract being made while the vessel was in distress. The appellant was the master of the steamship Lake Champlain, and the respondent was the master of the steamship Nettlesworth. On the 19th and 20th of July, 1879, the appellant, whose ship was lying at the time about fifty miles southward of the harbour of Gaspé, executed the following agreement:—

"SS. Nettlesworth, 19 July, 1879.

"I hereby promise to pay as per agreement, the sum of £800 to tow the steamship Lake Champlain into Gaspé Harbor.

(Signed), WM. STEWART,
Master of SS. Lake Champlain."

This service was performed for the appellant, who, on the 20th July, gave the respondent the following certificate:—

"SS. Lake Champlain-

"This is to certify that the SS. Nettlesworth has completed his agreement by towing the SS. Lake Champlain into Gaspé.

WM. STEWART,

Master of SS. Lake Champlain."

The action was brought by the respondent to recover the £800 sterling for the services mentioned in both documents.

The appellant by a special plea set out that the Lake Champlain sailed from Liverpool to Montreal on the 3rd July, 1879; at ten o'clock in the forenoon of the 13th, her screw broke down. She was then about eight miles off the southern point of the Island of Anticosti. At two o'clock of the same afternoon, the mate was put on board a passing ship, to be landed at Father Point, whence he might telegraph for steam tugs. About 3 p.m. on the 19th, six days after, the Nettlesworth hove to and offered assistance. The appellant found his provisions and water running short, and the passengers, 37 in number, implored him to accept assistance. He offered first £300 or £400, but these offers were refused, and finally the agreement above cited was entered into. The plea went on to state that this agreement was extorted from him, and that £800 was a grossly exorbitant charge. That before midnight of the same day the vessel was at anchor in Gaspé Basin, and the towage was performed during perfectly calm weather, and was of the ordinary kind.

DORION, C. J., said it was admitted at the argument that if the services were to be charged as salvage, the sum of £800 would not be excessive. Courts will not interfere in such cases unless the agreement is extorted by pressure of extreme necessity, and the amount be exorbitant. Here the vessel had a number of passengers on board; she had lost her propeller; she was on a dangerous coast, and if a storm had arisen her position would have been perilous. The appellant, by entering into an agreement to pay £800, could not be in a better position than if he had simply agreed to pay what was reasonable under the circumstances. In the latter case the respondent would be entitled to salvage, which, by the appellant's own admission, would have amounted to at least £800. It was further to be remarked in this case that after the steamship was in safety in Gaspé basin, the captain did not protest that the contract was made under duress, but gave a certificate that the

respondent had performed the agreement. This did not bind the owners, but it was evidence that the captain did not at that time think that he had been imposed upon. Under all the circumstances the Court did not think that the judgment should be disturbed.

RAMSAY, J. I concur in the judgment dismissing this appeal with some hesitation, and solely on the ground that there is a conflict of evidence rendering the decision doubtful. In such cases this court does not interfere with the decision of the court below. The certificate given by the captain that the services were rendered does not appear to me to affect the case. It does not purport to be a ratification, and the captain had no authority to ratify. To avoid misunderstanding I think it is right to say a few words on the principles which I think govern in cases like the present. In the first place, it appears to me to be clear that the services rendered were in the nature of salvage services. The steaming power of the "Lake Champlain" was useless. It does not appear very clearly whether the derangement of the screw had interfered with the working of the rudder or not; but it is quite certain that she was drifting helplessly and that she could do nothing to extricate her from the position in which she was, and without help the only chance of safety was the rather unlikely accident of drifting into port. The *Jubilee*, 42 L. T., N. S. p. 594. But it is because the service was in the nature of salvage that I think a court might have interfered with the contract. It never has been denied that an agreement to pay so much for salvage might be set aside if it were exorbitant. The doctrine is that it will not be readily set aside, if clearly proved, solely because it is a hard bargain. It must be wholly inequitable, that is exorbitant.

The *Helen & George*, 368 Swabey; The *Firefly*, 240 Swabey; The *James Armstrong*, 33 L. T., N. S., p. 390; The *Medina*, 1 L. R. Adm. Div. 272; Confirmed in appeal, 2 L. R. Adm. Div. 5; The *Silesia*, 43 L. T., N. S. 319; The cargo ex *Woosung*, 1 L. R. Adm. Div. 206; The *America*, 2 V. Ad. cases, Stuart p. 214, where there is an able statement of the whole case.

Under our law there could be no interference with a contract except in case of fear, violence, fraud or error, and it is precisely because the element of fear of danger is necessarily present

in all contracts of the nature of that sued upon in this case that I think courts can interfere to modify them. I go further and say that I don't think the contract in such a case strengthens in the least the position of the party exacting it, and I should not have been sorry to have concurred in a judgment which would have had the effect to discourage the practice of demanding such agreements.

The policy of allowing handsomely for salvage services is easily understood, and wise, but roughly to convert this rule into sanctioning extortion, simply on the ground that it was for salvage, seems to me to be a misconception of the policy of the rule, and disastrous. It may be difficult in practice to estimate the value of salvage services, but they have a measure.

In the case of "The Medina," Sir R. Phillimore likened the conduct of the salvor in extorting an exorbitant agreement to that of a pirate. It seems to me that the piratical disposition enters more or less into all agreements of that nature, for seamen know perfectly that they will be more than indemnified for their actual loss.

Judgment confirmed.

Davidson, Monk & Cross for Appellant.

Trenholme & Taylor for Respondent.

SUPERIOR COURT.

MONTREAL, June 18, 1881.

Before TASCHEREAU, J.

SEMMEHAACK V. CANADA FIRE & MARINE INSURANCE CO.

Fire Insurance—Change of ownership of goods insured.

Held, where the policy prohibited change of title without the permission of the company, that a sale of the property, by way of protecting a person becoming judicial surety, the resolution of such sale depending on the termination of the suretyship, made the policy null.

The action was against an Insurance Company on a policy of insurance, by which the plaintiff's stock-in-trade, consisting of fancy goods, was insured against loss by fire.

The principal plea of the Company was to the effect that, contrary to a condition endorsed on the policy, a sale and transfer of the goods of plaintiff had been made to one Fox, in

consideration of a certain suretyship entered into by Fox in favor of plaintiff's brother, in order to obtain the release of the brother from jail.

To this the plaintiff answered that there had been no delivery of the effects mentioned in the deed of sale, that the stock had always remained in Semmelhaack's possession, and the deed was without effect.

Condition No. 2 on the back of the policy was as follows:—"Without written permission of the Company, it will not be liable for loss or damage * * * if any change takes place in the occupation, location, title or position of the property herein specified. In every case without such permission, this policy is void, and all insurance thereunder immediately ceases and determines." It appeared that Semmelhaack had, without the consent of the Company, transferred his stock to one Cox, the consideration being that Cox had become surety in a proceeding for liberating Semmelhaack's brother from jail, in which he was confined under a *capias*. The same day Fox gave Semmelhaack a power of attorney to continue the business.

The Court sustained the plea and dismissed the action, the judgment being as follows:—

"La Cour, etc.

"Considérant que par acte de vente fait et passé à Montréal, devant Perrault, notaire, le 28 juillet 1879, le demandeur avait, antérieurement à l'incendie par lui allégué, vendu, cédé et transporté à un nommé Fox, à ce présent et acceptant, tout son fonds de commerce, qui était le même que celui qui était l'objet de l'assurance effectuée par la défenderesse, en et par la police d'assurance portant le numéro 15,887, mentionnée dans la déclaration et dans les plaidoyers en cette cause;

Considérant que la considération de la dite vente était un cautionnement judiciaire, que le dit Fox devait consentir, et a de fait consenti le même jour, à la demande du demandeur, dans une certaine cause ci-devant pendant devant cette cour, sous le No. 1,989, dans laquelle Leo Hamburger était demandeur, et William Semmelhaack (frère du dit présent demandeur) était défendeur, et emprisonné en vertu d'un bref de *capias ad resp.* émané en la dite cause;

"Considérant que la dite vente fut faite sous la condition résolutoire que dès que le dit Fox

serait libéré du dit cautionnement, la dite vente serait résolue et les parties à icelles remises en le même état que si le dit acte n'eût pas été passé, mais que la dite clause résolutoire n'a fait que rendre conditionnelle la résolution du dit acte, et que, dès le moment de la dite vente, le droit de propriété, pur et simple, du dit fonds de commerce est passé du demandeur au dit Fox, qui était propriétaire lors de l'incendie et même lorsque l'action a été portée ;

" Considérant que par la volonté expresse et formelle des parties au dit acte, il eût immédiatement son plein et entier effet, le demandeur perdant de suite le contrôle et la possession légale du dit fonds de commerce, qui fut placé sous le contrôle et entre les mains du dit Fox ; ce dernier, par acte passé le même jour, ayant nommé le demandeur comme son agent et mandataire pour l'administration et la vente du dit fonds de commerce, et le demandeur s'obligeant de rendre compte au dit Fox de sa dite administration et de lui remettre tous les deniers provenant de la vente en détail du dit fonds de commerce ;

" Considérant que le dit acte de vente du 28 juillet 1879, n'a pas été dénoncé à la défenderesse, qui n'a pas donné son consentement au dit acte, ne l'a pas approuvé, et n'y a pas participé ;

" Considérant que la résolution du dit acte de vente, survenue depuis le dit incendie et depuis l'institution de l'action, ne peut affecter les droits de la défenderesse ou sa responsabilité en cette cause ;

" Considérant qu'en vertu des articles 2576, 2483, 2475, et 2571 du Code Civil, et de la condition, numéro 2, attachée à la dite police d'assurance, la dite police d'assurance est devenue nulle, et la dite assurance a été terminée par suite de la dite vente et cession opérée sans le consentement et la participation de la défenderesse ;

" Maintient la défense, déclare que la dite police d'assurance a été annulée, rendue de nul effet, et la dite assurance terminée dès avant l'incendie allégué en la déclaration, et renvoie l'action du demandeur avec dépens, etc."

Action dismissed.

Macmaster, Hall & Greenshields, for plaintiff.
H. J. Kovanagh, for defendants.

SUPERIOR COURT.

MONTREAL, June 18, 1881.

Before TASCHEREAU, J.

GOODWATER V. HENDERSON.

Droit de réméré—Failure to exercise within time stipulated.

Where a droit de réméré is stipulated on payment of a fixed sum within a specified time, the entire sum must be paid within the delay.

The action was brought to obtain the rescission of the sale of a certain floating dry dock. The sale had been made by plaintiff to defendant 31st January, 1877, and in the deed a *droit de réméré* was stipulated in favor of plaintiff on payment of \$1,600 on or before 1st November, 1878. Plaintiff now tendered the balance which he alleged to be due of the \$1,600, and asked for the cancellation of the sale.

The defendant pleaded among other things that the *droit de réméré* had not been exercised in time.

The Court maintained the plea and dismissed the action, the judgment being as follows :—

" La cour, etc.

" Considérant que le demandeur n'a pas exercé dans le délai fixé le droit de réméré stipulé dans l'acte de vente en date du 31 janvier 1877, ni remboursé dans le dit délai au défendeur le prix de vente mentionné au dit acte ;

" Considérant que le dit délai était de rigueur, et ne peut être prolongé par le tribunal, et que le demandeur ne peut plus maintenant demander la résolution du dit acte de vente, le défendeur étant devenu, après l'expiration du dit délai propriétaire irrévocable du bassin flottant à cale sèche (floating dry dock) vendu par le dit acte ;

" Considérant en outre que le demandeur n'a pas même prouvé avoir, depuis la date du dit acte, remboursé au défendeur aucune partie de la somme qu'il prétend lui avoir remise à compte du dit prix de vente, mais que la preuve constate au contraire que les deniers payés par le demandeur au défendeur depuis cette époque l'ont été sur et en déduction d'un compte courant et d'autres réclamations que le défendeur avait contre lui ;

" Considérant d'ailleurs que le dit demandeur n'aurait eu droit de demander la résolution du dit acte de vente que s'il eût payé au défendeur le montant intégral du prix de vente avant l'ex-

piration du terme fixé pour l'exercice du droit de réméré, un paiement partiel ne lui donnant pas le droit d'exiger la résolution, mais un simple recours en répétition ;

" Considérant que le dit acte du 31 janvier 1877, a bien réellement opéré une vente entre les parties, et transféré au défendeur la propriété du dit bassin flottant, et que le fait que le demandeur serait resté en possession d'icelui après la vente ne change pas le caractère du dit acte ni n'affecte les droits des parties ;

" Maintient la défense, et renvoie l'action avec dépens, etc."

Girouard & Co., for plaintiff.
Robertson & Co., for defendant.

THE LAW OF LIBEL.

To the Editor of the LEGAL NEWS :

SIR,—Allow me to offer, through the columns of your journal, some remarks on the Bill recently introduced by Mr. Irvine. In my opinion, the remedy which that Bill sought to apply, already exists, if not in the eye of the civil law, at least in the eye of the public law.

That the constitutional law of England, which forms part of the law public, has been introduced into, and is still in force in Canada, most clearly appears by the preamble of the Union Act, 1840, and the preamble of the British North America Act, 1867. The constitution acknowledges the right of the people to self-government, and the people entrust representatives with the power of making laws, and a certain number of those representatives are selected by the Governor General, or the Lieutenant-Governor, for the purpose of executing those laws. The latter, as well as the former, are responsible to the people for the discharge of their duties. In order, therefore, that the people may continue their confidence in members of Parliament and Ministers of the Crown or withdraw it, it is necessary that they should be made aware of all acts of members and Ministers relating to public affairs, and also of those acts which, though private in character, may affect their qualifications as public men. It is one of the attributions of the press to convey that information. Then the press partly derives its existence from the constitution, and its liberty, within constitutional limits, covers as wide a field as the liberty of the people, to whose interest it is devoted. Some disadvantage may, it is true, be imposed

upon the individual whose character is attacked, but a greater advantage accrues to the people and more than counterbalances the particular wrong. The circumstances of the case repel the imputation of malice, which is the gist of the libel. But here malice is not to be taken in the vulgar or ordinary acceptance of the word, as meaning "wickedness"; it must be taken in its legal acceptance as meaning "an intent to do wrong." In the main the editor's action is not wrongful. The public interest prevails over the particular interest, and, consequently, public law prevails over private—i. e. civil law.

Thus do I mean to show that, under the circumstances contemplated by Mr. Irvine's bill, when truth is published for the benefit of the public, a newspaper editor is not actionable for damages on account of the wrong or tort which an individual is thereby made to suffer.

It may be objected that after Mr. Justice Ramsay's judgment in *R. v. McDougall et al.*, (18 L. C. J. 87), it was deemed necessary to enact 37 Vict. chap. 38, D., to enable defendants in criminal prosecutions for libel to plead truth as a justification, and that the same course must be followed with regard to the relevancy of the same plea in a civil suit. But it seems the positions are not the same. On the civil side, redress is sought for the wrong, while on the criminal side, the prosecution is for a liability to cause a breach of the peace. And in the latter connection only may we repeat the maxim, "The greater the truth, the greater the libel." However superior the public advantage may be to the particular disadvantage, it will not prevent a tendency to disturb the peace. The feelings of a certain individual have been injured, and he may be led to revenge. The principle governing the civil and criminal actions is quite different in each.

The position I take, and which, I humbly contend, cannot be easily assailed, is greatly strengthened by the late Chief Justice Rolland's ruling and direction to the jury in *Gugy v. Hincks*, in 1848, reported by Mr. Justice Mackay in the course of his judgment in *Mousseau v. Dougall et al.* (5 R. L. 446). There that learned judge gave it full and entire adhesion.

WILLIAM A. POLETTE, B.C.L.

Montreal, June 7, 1881.

RECENT ONTARIO DECISIONS.

Marriage when one party intoxicated.—In order to render void a marriage, otherwise valid, on the ground that the man was intoxicated, it must be shown that there was such a state of intoxication as to deprive him of all sense and volition, and to render him incapable of understanding what he was about.

Semble.—A combination amongst persons friendly to a woman to induce a man to consent to marry her, it not being shown that she had done anything to procure her friends to do any improper act in order to bring about the consent, would not avoid the marriage.

A marriage entered into while the man is so intoxicated as to be incapable of understanding what he is about, is voidable only, and may be ratified and confirmed.

Three years after the ceremony of marriage, which the man alleged he was induced to enter into while under arrest and intoxicated, an action was brought against him for necessities furnished to the woman, and for expenses for the burial of her child, in which the question of the validity of the marriage was distinctly put in issue. The man signed a memorandum endorsed on the record, in which he admitted the existence and validity of the marriage, and consented to a verdict for the plaintiff in the action.

Held, that if the marriage was previously voidable it was thereby confirmed.—*Roblin v. Roblin* (Chancery, June 11, 1881—Decision by Proudfoot, V.C.)

RECENT U. S. DECISIONS.

Contract—Real Estate broker.—Defendant employed plaintiff to find a purchaser for real property. Plaintiff was to receive \$500 for his services. Within a reasonable time plaintiff brought to defendant a purchaser willing to buy and pay the price. Defendant was satisfied with the purchaser, and entered into an agreement to convey to him the land. The purchaser declined taking the property on account of the state of the title.

Held, that plaintiff was entitled to recover, his right not depending on the validity of the title or the validity of a contract for the conveyance thereof between defendant and the purchaser.—*Gonzales v. Broad*, Supreme Court, California.—7 Southern L. R. 310.

Contract—Repudiation by purchaser.—Where the contract is for the manufacture and delivery of goods at a definite future time, and before such time the purchaser repudiates the contract, and notifies the vendor to that effect, such refusal is a breach of contract excusing the vendor from performance; and if he shows himself to have been ready, able, and willing to perform, it furnishes him with a good cause of action in damages for breach of contract.—*Eckenrode v. Chemical Company of Canton*, Court of App. Maryland, 7 Southern L. R. 311.

Stock-broker—Margins.—Where one employs a stock-broker to deal for him in margins, and deposits with him security, and knows no other person in the transaction, the relation is not that of principal and agent, but that which exists between two principals in a gambling transaction. In such case, where the employer is an infant, he can recover from the broker the money paid to and security deposited with him.—*Ruchisky v. De Haven*, Supreme Ct. Pa., 7 South. L. R. 348.

GENERAL NOTES.

The Chief Justice of Fiji, among other judicial dignitaries, has received the honor of knighthood.

In the list of Chief Justices of England, given on page 192, there was an omission of Lord Campbell, who held the office from 1850 to 1859. Lord Denman retired from office in 1850, not in 1851 as stated.

A metropolitan contemporary gives some interesting details as to the honorable forbearance of many lawyers to practice before relatives or even intimate friends upon the bench. The late Judge William Kent, it is said, never practised as an attorney before his father the Chancellor, nor did the present ex-Judge Jones ever practice before his father, who in his turn had refused retainers before his father, the first Judge Samuel Jones, in the last century. The son of the late Judge Samuel Betts accepted the clerkship of his father's Court rather than practice before him, but resumed his profession after his father's death. When Judge Rapallo's son has a case in his father's Court upon argument, his father always quits the bench. The late James T. Brady would never accept a fee in his brother's Court, not even if it was offered for an appearance before one of his brother's colleagues. Mr. William A. Beach pursues the same course in the Courts wherein his son presides. Judge Spier's son will not practice before his father. The late John S. Lawrence declined cases before his brother, of the Supreme Court. Some lawyers carry these ideas of professional delicacy so far as to be averse to trying or arguing cases before intimate friends who are judges.—*Alb. Law Journal*.

The Legal News.

Vol. IV.

JULY 2, 1881.

No. 27.

CAPITAL PUNISHMENT IN FOREIGN COUNTRIES.

Of all suggestions for the reformation of our legal system none, perhaps, is more certain to recur, when an opportunity presents itself, than that respecting the abolition of capital punishment. It is satisfactory, therefore, to find that the Government, appreciating the importance of the question, have taken measures to elucidate the matter by ascertaining the law of homicide as administered by other nations, and that, with this view, our foreign office, in July last, addressed a circular to Her Majesty's Representatives at foreign courts, directing them to procure the required information and statistics. The results of these inquiries are now placed before Parliament in the form of a white book of some sixty pages, which amply repay perusal.

Commencing in alphabetical order, Austria is the first country dealt with in the report. While under the Penal Code of 1852, which is still in force, capital punishment may be inflicted for murder, and similar crimes, and during the ten years preceding 1880 more than 800 death sentences were pronounced, the statistics show that no more than sixteen of the latter were actually carried out. In Hungary, also, the crime of murder is punishable with death, but by the new penal code of that country, which came into effect September last, it is expressly provided that in mitigating circumstances the penalty may be reduced to penal servitude. In Bavaria and in Belgium the punishment is retained, but in practice can hardly be said to exist. In the former of these countries, we are told, the sentence of death is rarely carried out, "as the king usually by royal clemency changes that punishment into one of penal servitude for life," and, in fact, during ten years, although 128 persons have been condemned to death, only seven executions have taken place. In Belgium the royal prerogative is still more freely exercised, for since the accession of the present king to the throne not

a single criminal has been executed, "it being impossible to obtain His Majesty's signature to a death warrant."

A similar report is sent from Denmark. No sentence of death in that country is considered definitive until it has been confirmed by the Supreme Court at Copenhagen, considered by the Council of Ministers, and finally submitted to the king; and, although it is stated that, "as a rule, a conviction of murder with premeditation, or of wilful murder without any extenuating circumstances, would be followed by a sentence of death," capital punishment has not been inflicted more than once or twice since 1863.

Under the French penal code, again, which has, in this respect, remained unmodified since 1810, the penalty of death is enforceable in the case of murder, when premeditated or accompanied by some other crime, but in the year 1878—and other years, it is said, would yield similar results—only four out of 125 convicted criminals were sentenced to capital punishment.

German statistics are no less significant. While, on the one hand, between 1869 and 1878, as many as 484 persons were in Prussia alone condemned to death, on the other hand, Lord Odo Russell reports that he has "every reason to believe that during the above mentioned period the only criminal executed was Hodel, the man who fired at the Emperor in 1878." "The fact," he adds, "is that his Imperial Majesty has so strong an objection to signing death warrants that, notwithstanding his stern sense of duty, it would be almost impossible to obtain his signature for the purpose, and this circumstance has become so well known, that in passing sentence of death a judge would now feel that he was doing no more than recording it, and that it would be commuted to one of penal servitude for life, or perhaps to one of even less severity."

The law of Russia presents an exception to the penal system already referred to, for in that country the punishment of death has in theory ceased to exist. It was abolished virtually, we are told, in 1741 by the Empress Elizabeth, who refused to confirm the sentences; but the Empress Catherine, in 1767, introduced its abolition into the penal code for all cases except those of high treason. In one part, however, of the Russian Empire—the Grand

Duchy of Finland—it is retained, and in cases adjudged by court-martial the penalty of death is frequently inflicted. The fact that courts of this latter kind are employed in the trial of "homicides of a political nature, and even those which are remarkable for the gravity of their results," probably affords ample ground for the concluding clause of the report from St. Petersburg, where it is observed that, "Abolished as capital punishment is *de jure*, it has never ceased to exist *de facto*, which stultifies the result of the abolition."

Of other European governments, Spain and Sweden only remain to be mentioned. The information relating to Portugal, Switzerland and other countries has not yet been received. Of Spain it is reported that capital punishment "has never been abolished by the Legislature, although it has temporarily been suspended by mob government;" and in Sweden, it is stated, out of thirteen criminals upon whom, between 1869 and 1878, the sentence of death was passed, only three were executed.

But the inquiries instituted by the Foreign Office have not been confined to Europe. A copious supply of reports is sent by Sir Edward Thornton from the United States, affording facts and evidence of a most conflicting nature. While in some seventeen States the punishment of death is retained and enforced with various degrees of rigor, it has been abolished in Maine, Rhode Island, Wisconsin and Michigan. In Kansas, also, it has, since 1872, been rendered practically inoperative by an enactment that no one convicted of a capital crime can be executed, except when so ordered by the Governor of the State, after the expiration of one year from the date of sentence. Popular opinion upon the subject in America also seems to be unsettled. It is stated, for instance, that in the State of North Carolina there is a growing sentiment against capital punishment, and that "if made a political issue it would be carried." Strong evidence in favor of its abolition is also supplied by the Secretary of State for Rhode Island, where, as already mentioned, the punishment no longer exists. "I think it is safe to say," he observes, "that the sense of our community is strongly against it. I do not recall any effort for many years to have it restored, and I think any proposition to that effect would receive very little sympathy; nor do I think it

can be claimed that homicide has increased in consequence of the abolition of the death penalty. I do not recall an instance where the penalty has presumably had any effect on the commission of the crime." On the other hand, however, an ex-Governor of the State of Ohio declares his conviction that more than three-quarters of the people are in favor of capital punishment, and states that during the term of his official experience he remembers "but one single instance when an opposition to capital punishment was given as a reason why the convict should be pardoned."

Such evidence as we have briefly cited must, on the whole, be admitted by the most zealous advocates of capital punishment to point irresistibly to one conclusion. It cannot be denied that among civilized nations the penalty of death is at the present time seldom inflicted, even in the case of the most heinous offences. In one European country, and in certain American States, the punishment has been formally abolished; in other countries the prerogative of pardon has been so liberally employed that capital sentences are only on rare occasions carried into execution. The merits of capital punishment as a deterrent, it is not our present purpose to discuss; but we may, in conclusion, refer to an opinion upon this point, expressed in the report for the State of Maine, which seems deserving of careful consideration. "The better opinion seems to be that criminals are not deterred from the commission of murder by the fear of the punishment of death which would follow their detection. If they believed that they would be detected and convicted of the crime, in almost every case they would refrain from its commission." Certainty of detection is more essential to an efficient penal code than severity of punishment.—*London Law Times.*

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, June 27, 1881.

Before MACKAY, J.

CAMPBELL v. JAMES et al.

Contract—Misrepresentation.

Held, where the defendants purchased the right from plaintiff to manufacture and sell a patented

churn, and more than two months subsequently wrote that the churn was a success, that they could not afterwards, in defence to an action on the contract, set up misrepresentation as to the merits of the patented article.

PER CURIAM. This is an action on an agreement which was entered into between the parties in April, 1880. Under the agreement in question the plaintiff gave the defendants the right to manufacture and sell a new kind of churn, called the *Monitor*, in the Province of Quebec, this churn being one for which plaintiff holds a patent. The plaintiff was to protect defendants, and the defendants were to keep on hand a lot of the churns of different sizes, so that the market should be furnished with them. The defendants were to push sales in the Province, &c., and were to pay plaintiff a royalty of \$1 a churn, and on 150 at least before February, 1881. They paid \$50 in advance, and were to pay quarterly on the first of May, August, November and February (first payment due 1st August, 1880), with attested accounts of sales each quarter. The \$100, balance of 1st February, 1881, is unpaid, and the plaintiff alleges that the defendants have failed to pay all else, and to render accounts each quarter as they were bound to do; that they have not kept the market supplied, and have not pushed sales, but have been negligent, and have thus damaged plaintiff to the extent of \$50. The conclusions are for the sum of \$150, and that the defendants be condemned to render a full account of all their sales and doings, or, in default of an account, that they be condemned to pay a further sum of \$500 as damages.

The plea is to the effect that plaintiff falsely pretended that his churn was a new and useful invention, and that its principle was new, whereas it is not new, and the churn does not perform its work in any way to fulfil what the plaintiff represented about it, and is not a new and useful invention; that the plaintiff was to defend the defendants selling said churn, but instead of doing so has allowed others to make and sell churns of like principle, although the defendants duly notified the plaintiff of what was going on; that the "Baldwin figure 8 churn" has been openly sold in competition with plaintiff's so-called invention and works upon like principle as plaintiff's patented churn,

but the plaintiff has never taken steps to prosecute those selling the Baldwin churn; that the Baldwin is a superior churn, and prevents the sale of plaintiff's, in consequence; that plaintiff gave the defendants the exclusive right to sell but had been selling, contrary to his agreement, churns manufactured by himself in the city of Montreal; that defendants did all they could, by advertising and sending agents about, and manufacturing churns, to push sales, and kept at it for months, but have only sold 13 churns, and the patent is worthless; that it is untrue that defendants have refused to furnish accounts to plaintiff, as they have regularly rendered accounts. The conclusions of the plea pray that the agreement of April, 1880, be rescinded and the plaintiff's action dismissed.

The plaintiff answered specially that the defendants had never made any complaints to him about the Baldwin churn, and that the rest of defendants' allegations were untrue.

The defence is not made out, but quite the contrary. The defendants' letters to plaintiff of June and July testify against them. On the 16th June, 1880, the defendants wrote asking license to sell the churn in Ontario, and on the 2nd July, 1880, the defendants wrote to plaintiff that the churn was a success. James' deposition proves this letter. I see no false representations by plaintiff, nor default by him towards the defendants. The latter have made a bad bargain, and lost money undoubtedly, yet their defence fails. The plaintiff did not guarantee any amount of sales to defendants, and the latter have not rendered to plaintiff quarterly accounts as he was entitled to have them, nor have they paid the plaintiff what they guaranteed him. Judgment will therefore go in favor of plaintiff for the \$100, balance, and for an account.

John L. Morris for plaintiff.

Maclaren & Leet for defendants.

SUPERIOR COURT.

MONTREAL, June 27, 1881.

Before MACKAY, J.

ROY V. THE GRAND TRUNK RAILWAY CO. OF CANADA.

Railway—Accident at Crossing—Negligence.

The plaintiff, while attempting to pass a railway crossing, was struck by a train and injured;

held, that he was bound to use caution in crossing the track at an hour when trains were usually passing, and the Company not being guilty of negligence or omission of the customary warnings, the plaintiff was not entitled to damages for injuries sustained.

PÉRURIAM. The plaintiff, a physician, complains that on the 23rd of November, 1880, at half-past five p.m., on St. Philippe street, at St. Henri, while crossing the railroad track there, he was struck by a *convoi* of the defendant's railroad. It is a very dangerous place, says plaintiff. The collision made him "*sauter une vingtaine de pieds dans l'air*;" he was going towards Point St. Charles, along St. Philippe street, and was struck by the train coming from Montreal, and moving westwardly. He had to keep his bed for a month, and a *maladie incurable* has been induced, which will abridge his existence several years, *de plusieurs années*. He suffered agonies (*les souffrances les plus aiguës*) for a month. At that place no sign was up to indicate the railroad track is there, and no lights there lighted it up. On the left side of St. Philippe street buildings reach to seven or eight feet from the railroad, and prevent seeing a train approaching from Montreal. Consequently, says the plaintiff's declaration, it was gross negligence of the defendant not to have barriers and lights there. The plaintiff adds that no bell nor whistle announced the approach of that train on that night; and here again was gross negligence. Evidently, says plaintiff's declaration, it was the fault of the defendant that the accident happened. Plaintiff had to call in doctors, which had cost him at least \$200. Further, the plaintiff's *voiture* was broken, and damages were caused to the amount of \$18 in repairs. Finally, at least \$300 was lost to plaintiff of earnings from attending to his usual practice. Considering all these damages, and the fact that from this accident the plaintiff's existence will be abridged, *infailliblement, de plusieurs années*, \$10,000 are the least damages that ought to be awarded plaintiff, says his declaration.

The plea is the general issue; denying plaintiff's allegations; denying that he has suffered as alleged, &c.; and a special plea, alleging that the accident was not caused by any fault of defendant, but that if plaintiff was hurt it was by his own fault and imprudence;

that plaintiff caused his own damages or contributed to them by his own negligence and imprudence.

The principal witness for plaintiff is his brother, Jos. Henri Roy, aged 19 years, a merchant's or shop clerk. He was driving plaintiff in a cariole. They had reached the track, when plaintiff cried out, "*Voilà les chars*." The driver jerked the horse, who made a leap and got across the track, but the hind part of the sleigh was struck. Plaintiff *est tombé à terre*, says Henri. He swears that they could not see the train approaching owing to a building; *ni sifflet, ni cloche*, was to be heard. The train was going more than six miles an hour, says Henri. He adds: It was a train of four cars drawn by an engine. He is certain, *positif*, that there were four or five, and that it was a freight train.

It is proved by the defendants that that November only three trains left Montreal passing St. Philippe street and going west of it, between 5 and 6 o'clock; one leaving Montreal at 5, one at one minute past 5, and the third at 20 minutes past 5. The two first were passenger trains, and the third one an engine with one freight car. Nobody on any of those trains felt any shock or was aware of having collided with anything that night. In approaching St. Philippe street crossing, all the engine bells were ringing. This is proved abundantly, not merely by the firemen and others in the employ of defendants, but by four indifferent persons. Upon this point Henri is flatly contradicted, as is plaintiff's declaration. Henri is proved untrue, also, in stating that the train was going more than six miles an hour, also in stating that it was a freight train of four or five cars, positively; for two and a half miles an hour was the greatest speed of the train there, and it was composed of only one freight car drawn by a pilot engine. If plaintiff's *voiture* was struck, it must have been by this pilot engine train, for none other passed there at the time stated in plaintiff's declaration, and it must have been very slightly for nobody on the train to perceive any collision. That plaintiff was thrown 25 feet into the air by the collision is untrue; there is not a shadow of proof of that; on the contrary, there is reason to doubt that plaintiff was thrown out of his vehicle. Henri says he was thrown out *en bas*. Leonard says he was

leaning on the vehicle, outside of it, when he first saw him, while Leon, *charretier*, and Walter McDonald say that plaintiff was in the sleigh all the time. Henri jumped out, and after picking up a parcel that had fallen out of the sleigh, the two turned round and drove away home, the plaintiff not much hurt apparently, and having his senses perfectly, and swinging out his arms to show that they were all right. The plaintiff's allegation that no sign was up to indicate the railway crossing at St. Philippe street is not true; nor is it true that plaintiff had to keep his bed for a month; nor is it true that a *maladie incurable* has supervened that will shorten plaintiff's existence infallibly. I do not believe that plaintiff suffered much. He made extraordinary efforts to prove the contrary, and to prove his *maladie incurable*, but he failed. His doctors had hard work to say what harm he had received, beyond a slight contusion between the lower ribs and the haunch. They were pressed to swear to impossibilities. The appearance physical of plaintiff before me was excellent. The allegation that he was put to expense of \$200 for medical attendance has not been proved. That plaintiff had to keep his bed for a month is not true. Dr. Scott's evidence is to the contrary. It is unfortunate for plaintiff that Dr. Scott called when he did, to find that the plaintiff, instead of being in bed, was away from his house at St. Henri. He had gone out. This was six or seven days after the accident.

I have said that the damage done to plaintiff was small; but be this as it may, another question is, namely: was or is defendant blameable for it—is *faute* proved against defendants? Upon this I find for defendants. Plaintiff is blameable for the accident by inobservance of precaution at approaching the railway crossing. He, resident at the place, was bound to know that the railway track was there, and he might have known that between five and half-past five three trains would pass there; for such had been the case all that month of November. Certainly no fault can be seen against the defendants; so they must go free.

Roy & Bouillier for plaintiff.

Geo. Macrae, Q.C., for defendants.

SUPERIOR COURT.

MONTRÉAL, June 28, 1881.

Before TORRANCE, J.

LA BANQUE JACQUES CARTIER v. MEUNIER, and PREVOST et al., creditors collocated, and LA BANQUE D'HOCHELAGA, contesting.

Hypothec—Insolvency.

A hypothec will not be set aside on the ground that the debtor was insolvent at the time it was granted, unless it appear that such insolvency was notorious, or that there was fraudulent collusion between the parties.

PER CURIAM. Prevost & Co. were collocated for the sum of \$811.31, under a mortgage, of date 28th April, 1880. The Bank contested the collocation on the ground that, at the date of the mortgage, Meunier, who gave it, was notoriously insolvent. C. C. 2023. One Marion was debtor of Meunier, and also liable on certain paper, which he (Marion) had received as accommodation from Meunier. He absconded in March 1880, and it became known that Meunier, besides his own liabilities, was seriously affected by the insolvency of Marion. Mr. DeMartigny, Cashier of the Bank Jacques Cartier, says he had a conversation with Meunier, after the departure of Marion, and that he had the appearance of a man completely lost in his affairs with Marion; and gave him the impression that he was not then solvent. "Était-ce connu dans le monde des affaires? (qu'il a été poursuivi par un grand nombre de personnes). Était-ce connu généralement? R. C'était à peu près admis qu'il était insolvable." This must have been in the early part of May.

In cross-examination, he is asked: "Au commencement de mai, pouvez-vous dire qu'il était notoirement connu, dans la cité de Montréal, que M. Meunier était insolvable? R. Moi, je crois que j'étais sous cette impression là qu'il était insolvable, après le départ de Marion; dès lors qu'il m'eût déclaré qu'il ne savait pas le montant des billets qu'il avait signés, j'ai cru qu'il était insolvable.

Q. Mais, était-ce une chose généralement connue parmi les hommes d'affaires de la cité de Montréal? Était-ce des bruits qui couraient la ville?

R. Je crois qu'un certain nombre le croyait; j'ai eu occasion d'en parler avec quelqu'un, et on a dit: ça va entraîner la faillite de Meunier.

Q. Était-ce avec les Directeurs de la Banque que vous avez parlé de cela?

R. Quelquefois avec les Directeurs de la Banque, et quelquefois en dehors. On croyait Meunier riche jusqu'à ce moment-là, mais après cela, on a dit : ça va entraîner la faillite de Meunier.

Q. Est-ce que j'ai compris de vous, tout-à-l'heure, que monsieur Meunier passait pour riche avant le départ de M. Marion ?

R. Jusqu'à ce moment-là, moi, je l'ai cru pour un homme à l'aise.

Q. Si vous aviez la certitude que ça n'excéderait pas \$3,000, (le montant de billets signés par Meunier pour Marion) est-ce que c'était de nature à le ruiner, à le rendre insolvable ?

R. Monsieur Meunier ignorait alors le montant des billets qu'il avait donnés pour Marion, et nous avons cru que c'était entre \$3,000 à \$4,000.

Q. D'après les informations que vous avez maintenant, ça n'excède pas \$3,000, et croyez-vous que c'était de nature à le faire passer pour insolvable, même à cette époque-là ?

R. D'après sa propre déclaration, j'ai été convaincu que ça l'amènerait en faillite, qu'il ne pourrait pas payer.

Q. Mais il n'y a que vous qui avez eu cette opinion-là ?

R. C'était une conversation avec lui ; mais comme je vous le remarque, l'opinion du public était qu'il était entraîné par la fuite de Marion, je parle de ceux avec qui j'ai eu des conversations.

M. Brais, Cashier of the Hochelaga Bank, says that when Marion left, it was notorious that Meunier was maker or endorser on his paper, and some of it being overdue, he saw Meunier to have an explanation. "Je lui ai demandé s'il était appelé à payer les billets de Marion, comment ça l'affecterait. Il m'a dit : s'ils continuent à vouloir aller comme cela, et vouloir me faire payer de suite, je ne suis pas capable de payer tout cela. Il m'a dit : Peut-être que plus tard je pourrais payer ; mais, dans le moment, si j'étais appelé à payer cela, je ne suis pas capable de le faire."

Q. Avez-vous eu occasion d'entendre parler, par différentes personnes dans le monde commercial, de la position de M. Meunier après le départ de M. Marion ?

R. C'est comme je le disais tout-à-l'heure, les gens, dans le moment du départ de M. Marion, n'étaient pas tout-à-fait positifs sur l'état des affaires de M. Meunier, et comment il pourrait rencontrer les billets de M. Marion ; les gens discutaient cela entre eux.

Q. Il y avait, au moins, beaucoup de doute sur la solvabilité de M. Meunier ?

R. Il y avait de grandes craintes. Je sais que dans le bureau chez nous, d'après les informations que nous avons prises, nous avons de grandes craintes sur la position de M. Meunier.

Q. Ensuite, avez-vous eu connaissance des poursuites qui ont été prises contre M. Meunier, par plusieurs de ses créanciers ?

R. Oui, monsieur.

Q. C'était généralement connu ?

R. Oui, c'était généralement connu.

CROSS-EXAMINED.

Q. Disait-on dans le monde commercial que M. Meunier était insolvable à cette époque-là ?

R. Je ne puis pas répondre à cette question-là.

Q. Est-ce qu'on disait cela, oui ou non ?

R. On disait qu'on ne savait pas comment M. Meunier pourrait sortir de là.

Q. Disait-on qu'il était insolvable dans le monde commercial ?

R. Ça, c'est difficile à dire ; moi, je ne l'ai pas entendu dire.

Vous ne saviez pas non plus qu'il était insolvable ? Vous aviez des doutes ?

R. J'avais des doutes ; c'est tout ce que j'avais ; personnellement je ne connaissais pas le montant que M. Meunier devait à Montréal.

Q. Il n'était pas dit publiquement que M. Meunier ne serait pas capable de payer ses dettes, de rencontrer ses affaires ?

R. Quant à ses affaires personnelles, tout le monde était certain de cela, mais quant aux affaires de Marion, on n'était pas certain.

Q. Mais on ne disait pas dans le public que M. Meunier ne serait pas capable de rencontrer les obligations qu'il avait souscrites ?

R. On disait qu'on ne savait pas comment il s'en tirerait avec les affaires de Marion.

Q. On faisait des suppositions dans le public ?

R. Comme de raison.

Q. N'est-ce pas au commencement de mai que vous êtes allé chez M. Meunier ?

R. C'est à la fin du mois d'avril ou au commencement de mai.

Touching the suits taken out against Meunier, the first I find is by the Molsons Bank, on the 27th April. The action by Prevost & Cie. is on the 29th April, and Prevost says he sued because the Bank had. Meunier carried on business till June. Do all these facts show notorious insolvency on the 28th April, and on the 1st May, dates of the two obligations? M. De Martigny says in his examination in chief that it was about admitted that Meunier was insolvent when he was sued. In cross-examination, in answer to the question whether Meunier was notoriously insolvent in the beginning of May, he says he was under the impression that he was insolvent. He adds, he thought a number thought so. The opinion of those with whom he had conversations was that Meunier was involved (*entraîné*) by Marion.

Mr. Blais, cashier of the Banque d'Hoche-la, could not say when Meunier was sued, that the commercial world said he was insolvent. He had not heard it. He had doubts himself. The facts show that Meunier was insolvent about the first of May, but I do not see proof of notorious insolvency—insolvency known to the public as a fact, or insolvency known to Mr. Prevost or Mr. Dionne. C.C. 1035.

Referring now to the jurisprudence of our Courts, I have before me a case of *Shaw*, mortgage creditor in the insolvency of *Warren*, 12 L.C.J. 309, where the mortgage was upheld by the Court of Review. Mr. Justice Mackay said: "It would be intolerable if mere insolvency should vitiate all transactions which have occurred in good faith with the insolvent. In order that it should vitiate such transactions, the insolvency must be known to the party or notorious." This case was reversed by the Queen's Bench, but on the facts. There is also the case of *Dorwin v. Thomson*, and *La Banque Jacques Cartier*, opposant, where the Superior Court (Torrance, J.) held that the *hypothèque* was valid where as a matter of fact C.C. 2023 could not apply. 3 Rev. Crit. 85. This judgment was reversed in Appeal, on the ground that the facts established notorious insolvency. 19 L. C. J. 100.

On the whole case, my conclusion is that the contestation by the Bank be dismissed, and the *hypothèque* allowed to stand.

Contestation dismissed.

Beique & McGoun for the Bank.

Duhamel & Co. for creditor collocated.

SUPERIOR COURT.

MONTREAL, JUNE 28, 1881.

Before TORRANCE, J.

WALKER V. THE CITY OF MONTREAL.

Corporation—Illegal arrest.

An arrest under the Vagrant Act (32-33 Vict. [Can.] c. 28), for indecent exposure, cannot be made without warrant after an interval of time following the offence, and where such unauthorized arrest was made the City was held liable in damages for the act of its policeman.

This was an action of damages against the City of Montreal and Alexis Prefontaine, one of its policemen, for an illegal arrest and criminal prosecution. The city pleaded that it was in no wise responsible for the acts of the policeman, and if plaintiff had been illegally imprisoned, Prefontaine did not act by the orders of the City. Prefontaine pleaded that complaints of indecent exposure of his person by Walker had been made, and he was arrested and indicted and a true bill found by a jury against Walker, and in the circumstances of this case, there was probable cause for the arrest and prosecution.

PER CURIAM. The facts show that Walker was arrested by Prefontaine by order of the assistant sergeant of the Chaboillez police station on the 16th April 1880, and confined in the station until the afternoon of the following day (Sunday), and then was liberated on bail. The following morning he was brought before the Recorder's Court on the charge of exposing his person to wit, his privy parts, publicly and indecently in St. Bonaventure street, and after hearing witnesses, the case was sent to the general sessions of the peace. There an indictment was laid before the grand jury, a true bill found and plaintiff was in the month of June acquitted by the petty jury. There was evidence by school girls who had complained to their parents that they had seen the plaintiff more than once in a lane or passage, and also in a yard with the gate open off St. Bonaventure street, exposing his person, with his trousers unbuttoned, and holding his privy parts in his hands. The plain English of it was that he obeyed a call of nature in a passage or yard off a street of the City. Probably he did it in a more careless way than might have been, and it is much to be regretted that the Corporation has not provided in convenient

places urinals which would prevent unseemly spectacles. The arrest was made without a warrant on a Saturday afternoon and the plaintiff was in custody nearly 24 hours before he was bailed out. Do the circumstances entitle him to damages, and is the claim good against the city and also against the policeman? The Vagrant Act, 32-33 Victoria (1869) (Canada) Cap. 28, has been cited. It provides for the punishment of persons openly or indecently exposing their persons. So also, the City Charter 14 & 15 Vic. Cap. 128, Sect. 87, makes it lawful for a constable of the police force to arrest on view any person offending against any of the by-laws, Rules, and Regulations of the City, the violation of which is punishable with imprisonment, and it may and shall be lawful also for any such officer or constable to arrest any such offender against any such by-law, Rule or Regulation, immediately or very soon after the commission of the offence, upon good and satisfactory information given as to the nature of the offence and the parties by whom committed.

We see here that the Vagrant Act provides for the punishment of persons openly or indecently exposing their persons, but it has no application to the present case; it does not provide for arrest without warrant after an interval of time following the offence. The City charter allows of the arrest by a constable of a person violating the City by-laws, rules and regulations immediately or very soon after the commission of the offence, but there is here no City by-law which has been violated, so far as I have seen. The policeman was to blame for what he did without a warrant, and he should answer for it in damages, and the City should also answer for him, for he acted on the order of his sergeant. Both will therefore be condemned. I would also add that plaintiff is to blame for responding to a call of nature in a way to offend a sense of propriety, though the offence is of every day occurrence, and the City is to blame further in this that it has not provided in convenient localities, urinals or places of retirement to be found in most of civilized countries in large cities. The damages are assessed at \$50 which will cover the loss of 10 days' pay, of which plaintiff complains among other things.

The costs will be those of an action over \$100.

Green Shields & Busted for plaintiff.
Roy, Q.C., and *Ethier* for the City.

RECENT U. S. DECISIONS.

Negligence—Injury to person stopping upon street from fall of defective wall.—A person lawfully passing along a street, who stops on the door sill of a house fronting on the street, for the purpose of adjusting his shoe, and while thus occupied, his head being within the lines of the street, without any negligence on his part, is injured by a brick falling on his head, in consequence of the dilapidated condition of the wall of the house, has a right of action against the owner of the house for the injury inflicted. *Deford v. State*, 30 Md. 205; *Irwin v. Sprigg*, 6 Gill, 200; *Copeland v. Hardengham*, 3 Campb. 348; *Maennerv. Carroll*, 46 Md. 212; *Butterfield v. Forrester*, 11 East, 60; *Bridge v. G. J. R. Co.*, 3 M. & W. 244. *Angell on Highw.* 347. Travellers on a street have not only the right to pass, but to stop and rest on necessary and reasonable occasions, so that they do not obstruct the street, or doorways, or wantonly injure them. *Douglas*, 745; 3 *Steph. N. P.* 2768; 2 *Bl. Com.*, note 26, by *Christ*; *Adams v. Rivers*, 11 *Barb.* 390. A ruined or dilapidated wall is as much a nuisance, if it imperils the safety of passengers or travellers on a public highway, as a ditch or a pit-fall dug by its side.—*Murray v. McShane*, Maryland Court of Appeals, 52 Maryland Rep.

GENERAL NOTES.

Were the verdict to stand which was given the other day at the Guildhall in the case of *Bartlett v. Eyre*, the legal obligations of the fashionable world of London would be very largely increased. A roll of carpet, such as is in universal use for such purposes, had been laid down from the door of the defendant's house to the door of his carriage. The plaintiff, in passing along the street, caught his foot in the carpet and fell, sustaining severe injuries. There was no suggestion, apparently, on the part of the plaintiff that there was any negligence on the part of the defendant or his servants in the way in which the carpet was laid down. The place where the accident occurred was lighted in the ordinary way, and the only complaint was that no one was stationed by the carpet to warn passers-by of its presence. We venture to think that the case was lost because no witnesses were called for the defence to prove that the carpet was laid in the ordinary way and without negligence.—*London Law Times*.

The Legal News.

VOL. IV. JULY 9, 1881. No. 28.

THE ATTEMPT TO MURDER THE PRESIDENT.

The attempt to murder the President of the United States will create an unmixed feeling of reprobation. It may perhaps have the effect of opening the eyes of people to some extent to the real nature of the anti-social ideas so rife in the world just now. They are by no means new, and although for the last few centuries civilisation has had the best of the battle, it would be a sad mistake to believe that the enemy is extirpated. It has a ceaseless hold in the savage tendencies of man. Nor is it wanting in the most highly advanced countries. There it frequently assumes elegant and polished forms. It is served by learning, eloquence and literary ability, so that the superficial are almost deluded into the belief that it is a new phase of civilization on which we are entering. The most dangerous means these cultivated apostles of disorder employ is their pretended philanthropy. They affect enthusiasm for the individual, as a blind for their dislike to social order. The doctrine of equality flatters the vanity and jealousy of mankind, and slander, working on the mean vice of suspicion, affords a plausible justification for every crime. About a year ago a popular lecturer alluded to Lord Leitrim's murder, and in justification of the murderer, related a sensational story, which, if not a lie, showed that the narrator was a participator in the murderer's guilt. This story was received with applause, and the whole was reported in the newspapers, without comment. It is only fair to the lecturer to say, that, either from some remains of moral sense, or the fear that his audience might have what he lacked, he failed to relate that Lord Leitrim's servant, who, it seems, was not guilty of the provocation which was supposed to justify his master's murder, was also assassinated at the same time. Two lives were thus sacrificed to satisfy the revengeful feelings of the barbarian brother of an unvirtuous woman, for that is the true moral of the narrative referred to. We have lately

heard much of the sympathy existing for the Nihilists; and the British House of Commons, by repeated votes, has testified to its sympathy with spoliation. It is idle to draw distinctions between murder and robbery, so as to condemn one, and applaud the other. The difference is only one of degree. It is more odious to murder than to rob, that is all; but an Act of Parliament does not efface the guilt of either, and history will condemn the Irish land bill just as it does the legalized murder of Strafford and the confiscations of Cromwell. The same authority which commands us to do no murder, has also forbidden us to steal, or even to covet what is another's. To tell us that a Czar may be murdered, because the Government of which he is the head is autocratic, and that a President may not, because his Government is democratic, is silly in the extreme. Sound sense condemns all such fallacies, and the laws of social order are as inexorable in protecting the life of the Emperor of Russia, of President Garfield and of the Queen, as they are in protecting the rights of Irish landlords. It cannot enter into our consideration whether the Czar should establish a Parliament at St. Petersburg or not, or whether a landlord should live in one place rather than in another, and if we allow such considerations to guide us, or even to sway our sympathies, we are working against true civilization. At first sight this will appear a heresy to those who are in the habit of looking at material progress as the equivalent of civilization; but it is quite easy to conceive a perfect barbarian swinging in the pivot chair of a drawing-room car, corresponding by telegraph and conversing by telephone. Progress is the general accompaniment of civilization, and it may safely be assumed that without the latter the former will not be enduring, but they are not synonymous. We shall probably hear that Guiteau is insane. The same plea might have been urged for Russakoff and for the virago who shared his crime and his fate. It has often been used on behalf of Mr. Gladstone, whose political changes at convenient seasons, appear to require some special apology. Wide as the definitions of insanity are, there is none that can be made to cover the acts of those social bandits who, ignoring the moral law, seek to shield themselves from responsibility by avowing a political motive for their crimes.

B.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, June 30, 1881.

DORION, C.J., MONK, RAMSAY, CROSS & BABY, JJ.

MUNN et al. v. LEWIS BERGER & SONS (a corporate body).

*Sale—Acceptance—Evidence—Parol.**Proof of acceptance (without delivery), under 1235 C. C., cannot be made by parol testimony.*

RAMSAY, J. The action is brought by Wm. Runton Munn and Robert Stewart Munn, doing business in Newfoundland under the name and style of John Munn & Co. The declaration sets forth the transaction as being carried out by Lord & Munn, as agents of John Munn & Co., with the defendants acting by their agent Wm. Johnson; that Johnson knew that Lord, Munn & Co. were acting as agents of John Munn & Co., and that Johnson purchased the goods in question, barrels of steamed oil. The declaration sets forth further that Johnson wrote to Lord, Munn & Co. withdrawing his offer, as though it had not been accepted; that Lord, Munn & Co. demurred to this, and that then Johnson authorized Lord, Munn & Co. to sell the oil for account of defendants. The defendants deny in the most ample manner that they ever purchased the oil, or had any negotiation with the plaintiffs concerning the oil, or that they had contracted with plaintiffs as alleged in plaintiffs' declaration. By a second plea defendants specially deny that Johnson was ever authorized by them, or that he had any authority to enter into the alleged contract on their behalf.

On the issues so raised the parties went to proof, and plaintiffs produced James Lord, a partner of Lord, Munn & Co., as a witness. Without objection Lord proved that Johnson was the agent of the defendants. He was then asked to state "what occurred on the occasion of the visit of Mr. Johnson to your office (i.e. office of witness), the 26th of May, 1878." Witness then related the propositions of Johnson, that Lord, Munn & Co. telegraphed to plaintiffs their answer accepting, and that Lord, Munn & Co. then offered the oil as stated. Here defendants' counsel interposed an objec-

tion "to the witness proceeding to detail the conversation if any which occurred between him and Mr. Johnson on this occasion, inasmuch as it is an attempt to prove by mere verbal conversation a contract for the sale of goods exceeding in value the sum of \$50, without having first produced any memorandum in writing, or made any proof within the requirements of Article 1235, C. C." This objection was maintained, and the ruling was excepted to.

On behalf of plaintiffs, witness was then asked: "Had you in store on account of Lewis Berger & Sons, a quantity of seal oil during the course of the summer of 1880?" Objection was taken to this on similar grounds, and particularly that there was no evidence that the defendants ever had delivery of any part or portion thereof, or that the said goods had ever passed out of the possession of Lord, Munn & Co., I suppose as agents of plaintiffs. This objection was maintained.

Witness was then asked: "Did you or did the plaintiffs in this case deliver any oil that you had in your possession for themselves; did they employ you to act as agent for them to sell it?" The defendants made a very lengthy objection to this question. They contended it was irrelevant unless it was intended to get witness to say that his firm held the oil for defendants. Other questions all seeking to elicit from witness answers to show that he had received verbal instructions to deal with the oil as if it were the property of defendants stored with Lord, Munn & Co., were put; but they were all objected to and the objections maintained by the Court unless some writing could be produced. The witness said there was no such writing. The plaintiffs then asked the following question: "Did the defendants by their agent, Mr. Johnson, exercise any acts of ownership over the said oil so in store during the months of July and August and September of the year 1880, and if so, state what the said acts of ownership were?" Objection was taken to this question, and the Court instructed the witness that "if there is any writing to establish the said acts of ownership he may answer." The witness says "there is no exercise of acts of ownership in writing." The Court thereupon maintained the objection.

The ruling of the Court then amounts to this that without a memorandum in writing being

produced, no dealing with the goods by mere words could be proved.

From these decisions plaintiffs seek to appeal, and as the point has been fully argued it becomes the duty of the Court to deal with the full merits of the application. The grounds urged by plaintiffs were, firstly, that it was not necessary under Art. 1233, C. C., to prove the memorandum in the first place. Secondly, that proof of an acceptance without a delivery sufficed to take the case out of the rule of our article, and that acceptance could be proved by parol.

The first of these objections appears to me only to raise a question of order of proceedings. It would probably be competent for a judge to admit parol evidence before the production of the memorandum in writing, if it were understood that the memorandum existed and would be produced, but when it is not contended that any such memorandum exists it would be absurd to admit evidence which could not possibly maintain the action. The form of the declaration leaves no doubt as to the position of the plaintiffs in the present case. It is obvious that the person who drew the declaration was perfectly aware of the difficulty before him, and that he purposely set up the dealing with the goods in order to get round it by proving a verbal dealing with the goods, if it may be so described. When the art. (1235) says no action shall be maintained without a writing, it clearly means that where there is no writing no such evidence shall be received, else we should have evidence adduced in support of that which cannot be maintained. I am therefore of opinion that the first reason is unfounded.

The argument in support of the second reason was this: Our code differing from the Statute of Frauds enacts that acceptance or delivery takes the case out of the rule, that acceptance may be verbal and may be without delivery, and consequently it can be proved by parol, just as delivery may be proved by parol. If we were to give the article this interpretation the whole rule would disappear, and proof by parol of a ratification would bind the buyer although he would not be bound by a similar proof of the contract. It must be clear that the only true interpretation of acceptance is to consider it as an acceptance in writing, or acceptance accompanied by some act, not mere words, or that ac-

ceptance is the synonym of delivery. Our attention has been directed to some authorities, but I do not think they tend to maintain the pretensions of the plaintiffs. The acceptance was in England, where, under the statute of frauds, there must be acceptance and receipt, and not as with us, or; and the acceptance must be an actual acceptance the intention of which is to be gathered from the outward acts of the buyer. (Agnew, p. 193.) No case has been brought under our notice where mere words spoken made an acceptance. The case of *Barnes & Jevons* (7 C. & P. 288) seems to be the nearest to this; but even in that case there was a taking of a person to see the engine besides the words, and the question was left to the jury whether the defendant had treated the engine as his. In summing up, Baron Alderson specially notices the taking the person to see the engine.

Motion for leave to appeal rejected.

Kerr, Carter & McGibbon, for plaintiffs.

Abbott, Tail & Abbots, for defendants.

COURT OF REVIEW.

MONTREAL, June 30, 1881.

SICOTTE, TORRANCE, RAINVILLE, JJ.

[From S. C., St. Francis.

BECKET V. TOBIN.

Sale—Credit.

Where A. ordered goods to be delivered to H. & T., and credit was given by the vendor to A., held, that A. might be sued by the vendor for the value of the goods.

TORRANCE, J. The action here is for goods sold and delivered to John Tobin, who denies the indebtedness and says the sale was to Ham & Tobin, different persons. I am of opinion that there is quite enough to sustain the judgment which condemned the defendant. I refer to the evidence of Chapman, Becket and Kemp. Ham & Tobin were building a hotel and could get no credit. They had a promise of sale of land from one Hamilton, they transferred the promise to John Tobin, and he registered the transfer. He then ordered Becket, the plaintiff, to deliver the goods to Ham & Tobin, the last being his brother, Dennis Tobin. Becket treated John Tobin as his debtor from the first. The account was presented to him, as debtor, by Kemp, and he promised to give a note jointly

and severally with Ham, but wished Ham to certify to the correctness of the account. Credit was given to him, and the goods were supplied for the benefit of the property held by him. Parsons, Mercantile Law, cap. 7, section 2, p. * 73, says "It is often difficult to say whether the promise of one to pay for goods delivered to another is an *original* promise, as to pay for goods delivered to another, or a promise to pay the debt, or guarantee the promise of him to whom the goods are delivered. The question may always be said to be: To whom did the seller give and was authorized to give credit? This question the jury will decide, upon consideration of all the facts, under the direction of the Court. If, on examination of the books of the seller, it appear that he charged the goods to the party who received them, it will be difficult, if not impossible, for him to maintain that he sold them to the other party. But if he charged them to this other, such an entry would be good evidence, and if confirmed by circumstances, strong evidence that this party was the purchaser." Vide note (2). Here the land was transferred to John Tobin, and the delivery was for his benefit. Judgment confirmed.

Hall, White & Panneton, for plaintiff.

Ives, Brown & Merry, for defendant.

SUPERIOR COURT.

MONTREAL, June 6, 1881.

Before MACKAY, J.

THE MUTUAL FIRE INSURANCE Co. of Joliette v.
DESROUSSELLES.

Declinatory Exception—Cause of action.

The cause of action in a suit brought by a Mutual Insurance Company against a member, arises where the policy is dated and where the application is accepted, and at the place where the head office of the Company is situated, and not where the deposit note and application are made.

MACKAY, J. This action is brought by the Company plaintiff, against the defendant, as a member, for the amount due by her for assessments.

In August, 1878, the defendant, who resides in Beauport, in the District of Quebec, made an application to the Company,—whose head office is in the City and District of Montreal,—to be admitted a member. Accompanying this

application, defendant sent to the Company her deposit note, dated at Beauport, and undertaking to pay such assessments as might in due course be made.

The application was accepted,—as is proved by the Secretary of the Company,—at Montreal, and a policy of insurance issued, which refers to the deposit note, and makes the defendant subject to all the rules of the Company.

The defendant having afterwards failed to meet the assessments made on her, action is brought at Montreal and served on the defendant in Beauport, whereupon she pleaded by *exception déclinatoire*, that the whole cause of action did not arise here, and that consequently action could not be brought in this district.

It appears, however, that there is but one contract between the parties, and that that was made and completed in Montreal. The judgment is as follows:—

"Considering that female defendant has become a member of plaintiffs' company, and that from the time of said company issuing to her the policy, and her taking it, and not before, she became such member, and that plaintiffs' right of action has accrued from such policy and membership, and the obligations on defendant flowing therefrom;

"Considering that only in Montreal did the consent of plaintiffs and defendant first meet, and was the *marché conclu* upon which defendant is sued:

"Doth dismiss the said exception with costs."

Church, Hall & Atwater, for plaintiff.

Lacoste, Globensky & Bisailon, for defendant.

SUPERIOR COURT.

MONTREAL, July 4, 1881.

Before MACKAY, J.

MONETTE V. CHARRETTE.

Mandamus—Writ will not issue if result fruitless.

PER CURIAM. This case came up on the merits of a mandamus. Monette took a mandamus against Charrette, a magistrate at St. Martin, because (it was said) he had refused to take the information of Monette against one Nadon. Monette complained against Nadon for deserting his service. Monette alleged that he had his affidavit ready, and asked Charrette to take his

information, but Charrette would not do so. But it happened that at the very time, or soon after, Monette got another magistrate to issue his warrant, and Nadon was convicted. On the day of the return of the mandamus, it would have been perfectly vain to order Charrette to take the complaint against Nadon. Yet Monette asked for a mandamus. He did not say that the case had resolved itself into a miserable small one of costs or anything of the kind. Both parties embarked in an *enquête* of great length, all to no purpose. Under the circumstances the Court is of opinion, considering that the chief object of the mandamus was to compel defendant to receive plaintiff's complaint against Nadon; and that plaintiff did not absolutely refuse to do so; and that on the 6th September plaintiff prosecuted the said Nadon, and had him convicted on the same charge for which he wanted defendant to allow him to proceed against Nadon; that defendant cannot be ordered to take or allow prosecution of Nadon now before him for the same offence, and peremptory mandamus had no reason to be, and would lead to illegality; that this was ascertained seven days before the day for return of the original mandamus summons in this cause or matter; and so the prosecution was unwarranted, and the mandamus must be dismissed with costs.

Leblanc, for plaintiff.

Duhamel & Co., for defendant.

SUPERIOR COURT.

MONTREAL, July 4, 1881.

Before MACKAY, J.

BAXTER v. SILLS.

Capias—Petition to quash.

PER CURIAM. The defendant, who has been capiased, petitions to quash the capias, and to be liberated. A motion is made by the plaintiff that the motion be rejected as illegal, null and void. It is said that the petitioner urged matters of law and fact mixedly. There is nothing in this motion, and it must be rejected. Under 819 C. C. P., the defendant is allowed to show that the allegations of the affidavit are false or insufficient. Petitioner says that the affidavit allegations are false and that

they are insufficient. Motion of plaintiff dismissed with costs.

Greenshields & Busted, for plaintiff.

Ritchie & Ritchie, for defendant.

SUPERIOR COURT.

MONTREAL, July 4, 1881.

Before MACKAY, J.

LEWIS v. SENECALE.

Sale—Deficiency in quantity.

PER CURIAM. This is an action for the price of liquors sold. The goods were sold and delivered in Montreal and removed in bond by defendant to Sorel. The defendant objected to the quantities charged. The Court is of opinion that there is conflict of evidence as to the quantities, and room to question whether the defendant has received the full amount of gallons charged for. But he ought, upon getting the liquors into possession, to have claimed a verification and had one actually effected, after notice to the plaintiff. He has not taken such course, he has never offered back the goods, and has used five-sixths of them. He must now pay as charged. Judgment for the plaintiff.

Abbott, Tait & Abbotts, for plaintiff.

Roy & Boutillier, for defendant.

SUPERIOR COURT.

MONTREAL, July 4, 1881.

Before MACKAY, J.

LECLERC et vir v. JOSETTE MUTUAL FIRE INSURANCE Co.

Procedure—Revision of rulings of Commissioner.

PER CURIAM. The female plaintiff was insured for \$400 on a house destroyed by fire, and sued on the policy. There are several pleas—that the proofs required after the loss were not furnished; that there were gross misrepresentations; that the wife said it was her house, whereas it was her husband's. The *enquête* has been taken under a commission, and the Commissioner has made illegal rulings. But no proceedings were taken on that. The defendant might have moved to have the rulings revised. But instead of doing that, he objected generally, and now moves, without notice, and at the final argument on the merits, that the

enquête be re-opened. There was also a petition to me in Chambers to discharge the *délibéré*. This petition must be dismissed, and so the motion to reopen the enquête. On the merits, judgment for plaintiff for debt, interest and costs.

Ouimet, Ouimet & Nantel, for plaintiff.

F. O. Wood, for defendant.

THE SALE OF THE GOOD WILL OF A BUSINESS.

The decisions of the Master of the Rolls in the recent cases of *Ginesi v. Cooper*, 42 L. T. Rep. N. S. 751; L. Rep. 14 Ch. Div. 596, and *Leggott v. Barrett*, certainly carried the law as to the duty of the vendor of a business who afterwards commences another business similar to the one sold, considerably beyond what it previously had been, and the judgments of the Lords Justices in *Leggott v. Barrett*, 43 L. T. Rep. N. S. 641, dissolving that part of the injunction granted by the Master of the Rolls which restrained the defendant from "dealing with any customer or customers of the firm," in addition to the ordinary words restraining solicitation merely, usefully indicate the proper limits within which, in their opinion, a vendor is, under such circumstances, free to carry on business again, and how far the fact of the prior sale curtails his right of free trading.

In this case the defendant, who had for some years carried on, with the plaintiff, the business of furnishing ironmongers in Bradford, dissolved partnership in July, 1879, and by a deed dated in November of the same year, for the consideration therein mentioned, assigned to the plaintiff all his share in the stock in trade, fixtures and partnership assets generally of the firm. He further covenanted that he would not, "within the space of ten years from the date of the said dissolution of partnership, commence business, either on his own account or in copartnership with any other firm or firms, or take any situation in the trade or business of an ironmonger in Bradford, or within ten miles thereof, except in Leeds, and soon afterwards the plaintiff, alleging that the defendant had sent circulars to and was doing business with some of the old customers of the firm, applied to the court for an injunction restraining the defendant not

only from soliciting but also from dealing with such customers. This order the Master of the Rolls, in accordance with his previous decision in *Ginesi v. Cooper*, made, but the Court of Appeal have held that, while it would be obviously unfair for the defendant to attempt to decoy the old customers from the partner to whom the business had been sold, yet that no rule of justice requires, in the event of those customers, without solicitation, choosing to call at the defendant's shop, that he ought to be restrained from dealing with them.

Although no mention of the word "good-will" may be made in the assignment of a business, it has long been held that the sale of a business carries with it both the good-will and the trade-marks that have been used in connection with it, and in all cases arising out of the resumption of business by a person who has previously sold a similar one, the only important question to be decided is whether or not there has been fraud upon a contract, express or implied, entered into by the vendor at the time of the sale—in the words of Lord Justice Brett—"that he will not immediately afterwards do away with that for which he has been paid, by soliciting the customers, and so practically destroy the good-will which he has agreed to transfer to or leave with another."

Notwithstanding that the nature of the good-will must of necessity vary very much according to the character of the business to which it belongs—as, for example, the good-will of a public house, which is almost entirely local, in contrast with that of a newspaper or patent medicine, which mainly depends upon the name—there are yet in all cases certain common and easily recognizable attributes which it has been found convenient to classify under this name. No better definition has ever been given than the broadly comprehensive and masterly one furnished by Vice Chancellor Wood in *Churton v. Douglas*, Johns. 174, when he says: "'Good-will,' I apprehend, must mean every advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the

business." Attempts have been frequently made from time to time to restrict the advantages comprised in this term to the use of the actual premises where the business has been carried on, and such dicta as those of Lord Eldon in *Crutwell v. Lye*, 17 Vesey, 335, "The good-will, which was the subject of the sale, is nothing more than the probability that the customers will resort to the old place," and of Lord Langdale in *England v. Down*, 6 Beav. 269, "The good-will is the chance or probability that custom will be had at a certain place of business in consequence of the way in which that business has been previously carried on," have been quoted in support of this view; but there is no doubt that at the present time the wider interpretation of the term as given by Vice Chancellor Wood is the accepted one.

It has been questioned whether, strictly speaking, there can be such a thing as the good-will of the business of a professional man apart from the mere recommendation or good word which he may personally address to his clients in favor of his successor, and that therefore the value of such a business on the death of the practitioner, need not be taken into account by his executors. The fact, however, remains that on the death of a medical or legal practitioner, there are always persons willing enough to pay money for the "practice," and, illogical as it may sound, there is yet such a thing as the transferable good-will of a business, such as that of a surgeon or solicitor, which depends almost entirely on individual skill, and has little to do with the local reputation of an establishment to make it valuable. But, although in the case of *Smale v. Graves*, 15 L. T. Rep. 179; 3 De G. & Sm. 706, where a widow and acting executrix of a surgeon dentist had sold the good-will of the practice for an annuity of £100, it was held by Vice Chancellor Knight Bruce that, if not the whole, at any rate some part of the annuity belonged to the estate, there are other conflicting cases, and the point does not at present appear to be quite free from doubt. In the case of an ordinary trading partnership it is now clearly settled that the good-will is a partnership asset, and must, on dissolution, be realized, together with the other assets, for the benefit of all the partners. On dissolution by the death of a partner, however, it has been said that the good-will survived, and there is an old

decision to that effect. But the modern authorities are opposed to this view; the good-will is clearly a saleable asset of the old firm, although it must be borne in mind that the surviving partner is under no obligation to give up business, and, by choosing to continue it, may be able to deprive the good-will of the late firm of nearly all its value.

The right to use the trade name identified with the business purchased, has been held to pass as part of the good-will. Thus, in *Levy v. Walker*, 39 L. T. Rep. N. S. 656; L. Rep. 10 Ch. Div. 436, it was decided by the Court of Appeal reversing the judgment of Vice-Chancellor Hall, that the assignment of the good-will and business of C. and W. did convey the right to use the name of C. and W., and the exclusive right to use that name as between the vendor and purchaser of that business. The use of the business trade-mark is also sometimes a very important part of the good-will, and by the Registration of Trade Marks Act, 1875, sec. 2, it is provided that, "when registered, the trade-mark shall be assigned and transmitted only in connection with the good-will of the business concerned in such particular goods or class of goods, and shall be determinable with such good-will."

Although the vendor of a business has a perfect right, in the absence of special provision, to set up in an exactly similar business in the immediate vicinity of the place where the old one was carried on, yet he must abstain from any representation, even from the use of his own name, in a manner likely to induce the belief that his business is the same as, or a successor of, the old one; for this would simply be a false and fraudulent proceeding, and an infringement of the right of property in another person. And as the solicitation of customers of the old firm cannot, in this case, be made without some reference, express or implied, to the relations once subsisting between them and the firm as previously constituted, it would not be fair or reasonable that the person who has sold the good-will should thus set to work to destroy the business that he has sold to another. But to enjoin a man, or to prevent him by means of damages, from even dealing with persons who under the old conditions had been his customers, carries the equitable doctrine much farther, and if adopted, would, as Lord Justice Brett says, in

Leggott v. Barrett, "prevent the customers from having the liberty which anybody in the country might have, of dealing with whom they liked." The rule, as to the proper mode of carrying on business by one who has previously sold a similar business, being now restored to what it was before the recent decisions of the Master of the Rolls, will doubtless be always in practice found sufficiently stringent to prevent any fraudulent use being made of those business advantages, which the very purpose of the previous sale had been to part with, and make the property of another.—*London Law Times*.

RECENT U. S. DECISIONS.

Mandamus—Will not issue if result fruitless.—Mandamus will not issue, even if the facts would warrant its issue otherwise, if the result will be fruitless. Says Brown: "It is a maxim of our legal authors, as well as a dictate of common sense, that the law will not itself attempt to do an act which would be vain; *lex nil frustra facit*, nor to enforce one which would be frivolous—*lex neminem cogit ad vana seu inutilia*." The law will not, in the language of the old reports, enforce any one to do a thing which will be vain and fruitless.—*Clark v. Crane*, California Supreme Court.

Malicious Prosecution—What necessary to sustain action—Probable cause.—In order to maintain the action for malicious prosecution, it is incumbent on the plaintiff to show that he had been prosecuted by or at the instigation of the defendant, and that such prosecution was instituted maliciously and without probable cause. These ingredients are essential to the right of action, and if they are not found to co-exist, the action is not maintainable. While the malice necessary to the right of recovery may not be deduced as a necessary legal conclusion from a mere act, irrespective of the motive with which the act was done, yet any motive other than that of instituting the prosecution for the purpose of bringing the party to justice is a malicious motive on the part of the person who acts under the influence of it. *Mitchell v. Jenkins*, 5 B. & Ad. 594; Add. on Torts, 594, 613; 2 Greenl. on Ev., § 453; *Boyd v. Cross*, 35 Md. 194; *Cooper v. Utterbach*, 37 id. 283; *Stansbury v. Fogle*, id. 386; 1 Tayl. on Ev. 40. Probable cause is made to depend upon know-

ledge of facts and circumstances which were sufficient to induce the defendant or any reasonable person to believe the truth of the accusation made against the plaintiff, and that such knowledge and belief existed in the mind of the defendant at the time the charge was made or being prosecuted, and were in good faith the reason and inducement for his putting the law in motion. Mere belief that cause existed, however sincere that belief may have been, is not sufficient. *Delegal v. Highley*, 3 Bing. N. C. 950; *McWilliams v. Hoban*, 42 Md. 57; 2 Greenl. on Ev., § 455; *Perryman v. Lister*, L. R., 3 Exch. 197; S. C., L. R., 4 H. L. 521; *Merriam v. Mitchell*, 13 Me. 439.—*Johns v. Marsh*.—Maryland Court of Appeals, 52 Maryland Rep.

PROFESSIONAL ETHICS.

To the Editor of the LEGAL NEWS:

SIR,—The delicacy which prevents an advocate from pleading in the court of a near relative is doubtless "honorable" in a sense; but it also indicates a certain moral timidity. It is hardly possible to conceive that a judge should be swayed one way or other by the person who urges the argument. In the multitude of affairs that comes before a judge it generally happens that the judge does not recollect who the pleader was. In England where the habit of suspicion has not yet become a national vice, such instances as those mentioned in the *Albany Law Journal* would be regarded as affectations. The rule in England goes no further than this, that a barrister shall not select his father's circuit for practice. To lay it down as a rule that a lawyer is not to practice in the court in which his father is a judge would be to decree that the son of a judge shall not be a lawyer. R.

GENERAL NOTES.

It is stated that Sophie Perofskaja, who was one of the recently executed Nihilists, was the first woman who has been executed in the Czar's dominions since 1791, in which year a governess named Mary Hamilton had her head publicly cut off at St. Petersburg, for having made away with her three illegitimate children. Twenty-five years after that event, Elizabeth, daughter of Peter the Great, abolished the punishment of death, and it has never been reintroduced into the Russian criminal code. Hence, when anyone commits a crime of extraordinary atrocity in Russia, in order that the death punishment may be awarded, the criminal must be tried by a military tribunal or by a special high court of justice.

The Legal News.

VOL. IV.

JULY 16, 1881.

No. 29.

DISCLOSURE OF PROCEEDINGS BEFORE GRAND JURY.

In the recent case of *United States v. Farrington*, (2 Crim. L. Magazine 525), the Court held that whenever it becomes necessary to the protection of public or private rights, any person may disclose in evidence what transpired before a grand jury. But the Court, being of opinion that it will not subserve any of the purposes of justice to disclose how individual jurors voted, or what they said during their investigations, held that these facts cannot be shown in evidence. In the case in question the attorney representing the private prosecutors had appeared as a witness before the grand jury with a number of bank books, and had read such selections as he pleased. His testimony was interspersed with comments upon the force and effect of the testimony, in the nature of an argument, which, in the language of the district attorney, was "animated, spirited and excited." On motion to quash the indictment, the judge remarked: "It is not the province of the Court to sit in review of the investigations of a grand jury, as upon the review of a trial when error is alleged; but in extreme cases, when the court can see that the finding of a grand jury is based upon such utterly insufficient evidence, or such palpably incompetent evidence, as to indicate that the indictment resulted from prejudice, or was found in wilful disregard of the rights of the accused, the Court should interfere and quash the indictment." In a note to the report two English cases are cited. In *Reg. v. Hughes*, 1 Car. & K. 519, it was held that, upon an indictment for perjury for giving false evidence before a grand jury, a person who was in the grand jury room at the time, as a witness upon the indictment then being considered, is competent to prove what was sworn to during the examination, on the ground that he was not sworn to secrecy, as the members of the grand jury were. In admitting the testimony, Tindal, C.J., said it was for the purposes of public

justice, and should be received. And in *Reg. v. Gibson*, 1 Car. & M. 672, which was a prosecution for a felony, a witness for the prosecution was asked, in cross-examination, whether he had not stated certain facts to the grand jury. Parke, B., said he saw no objection to the question, and thought the witness was bound to answer it.

THE LATE LORD HATHERLEY.

The death is announced of Lord Hatherley—William Page Wood. The deceased was the second son of the late Alderman Wood. He was born November 29, 1801, graduated at Trinity College, Cambridge in 1824, was called to the bar in 1827, and was made Queen's Counsel in 1845. He represented the city of Oxford in Parliament from 1847 to 1852. In 1849 he was nominated Solicitor-General, succeeding the late Sir Alexander Cockburn. He left office in February, 1852, on a change of administration, but in December of the same year he was appointed a Vice-Chancellor on the promotion of the late Sir George J. Turner. This office he held for fifteen years, until in March, 1868, he was made one of the Lords-Justices of Appeal in Chancery. In December, 1868, he was appointed Lord Chancellor in the place of Lord Cairns, and created a peer, by the title of Lord Hatherley. As a judge the deceased was always held in great esteem by the bar and the public, though his decisions do not take the highest rank as authority.

THE BAR EXAMINATIONS.

The examinations at Montreal, of candidates for admission to study and practice, have been concluded, and the result is announced as follows:—

Admitted to practice.—E. McMahon, J. B. Berthelot, T. T. Brousseau, A. David, J. O. Drouin, J. U. Emard, G. Foster, E. Guerin, E. Lamirande, W. Lighthall, H. G. Lajoie, C. A. Madore, A. S. Mackay, G. Raynes, L. J. B. Taché, L. E. Turgeon, A. G. Ingalls, W. A. Polette, J. E. Paradis, W. A. Weir, S. Jackson, A. G. Cross, E. Gauthier, J. D. Leduc, and R. S. Weir.

Admitted to study.—Auguste Delisle, R. Forest, A. Franchère, C. Lanctot, C. B. Daoust, L. P. Brodeur, C. Bruchesi, A. Bonneau, F. Charbonneau, J. H. Rogers, G. E. Malette, H. Pelletier, N. Rielle, C. S. Campbell, F. McLennan, A. N. Desautel, M. Landreville, F. Gerin Lajoie.

NEW PUBLICATIONS.

McGLOIN'S REPORTS:—Courts of Appeal of the State of Louisiana.

We have received part 2 of Vol. I of the above reports, edited by one of the judges of the court of appeals for the parish of Orleans, the object of the work being to preserve opinions of interest which may be rendered from time to time by the various courts of appeal of the State of Louisiana. Many of the cases reported in the present issue are of special interest in the Province of Quebec, and the reporter's work is very well done.

LOVELL'S GAZETTEER OF BRITISH NORTH AMERICA: containing the latest and most authentic descriptions of over 7,500 cities, towns, villages and places, in the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island, Manitoba, British Columbia, the North West Territories, and Newfoundland; and general information drawn from official sources, as to the names, locality, extent, etc., of over 2,300 lakes and rivers; with a table of routes, showing the proximity of the railroad stations, and sea, lake and river ports, to the cities, towns, villages, etc., in the several provinces. Montreal, John Lovell & Son, Publishers.

The above is a new and revised edition of a work which appeared in 1871. The growth of the country is attested by the fact that the present edition contains over fifteen hundred places not to be found in the former edition. The book is neatly got up, in convenient form for reference, and evinces the care and accuracy which mark the publications of the Lovell publishing house. A good map of the Dominion is contained in it. The Gazetteer, we are glad to learn, has been very favorably received by the public, and the examination which we have made of the work shows that its success is due to its unquestionable merit.

STATUTES OF CANADA, 1880-1. Queen's Printer, Ottawa.

The complete edition of the Statutes of the Dominion passed in the last session has been issued by the Queen's Printer. The profession will be pleased to have the work so promptly to hand.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, July 8, 1881.

Before TORRANCE, J.

BELCOURT V. MACDONALD.

Contract—Breach—Failure to make connection.

This was an action of damages against the late lessee of the Q. O. & O. R. R. for breach of contract. The defendant agreed to run the railroad trains between Hochelaga and Calumet in connection with a steamer run by Belcourt between Ottawa and Calumet. The chief complaints of Belcourt were that Macdonald had failed to provide a proper wharf and shed at Calumet, or to deepen the channel so as to allow his steamer to approach the landing place, that on or about the 18th June he had suddenly changed the hours of departure and arrival of his trains so as to break the connection with Belcourt to his great damage, and he had also broken his agreement as to an excursion train on the Queen's Birthday in 1877.

Macdonald answered the action by complaining that Belcourt omitted to render him accounts of his receipts of money: that he had a judgment against Belcourt for \$125 on a draft of date 13 June 1877, accepted by Belcourt as an acknowledgment of such money, and that the steamer provided by Belcourt had been seized by the owner thereof, and taken away from Belcourt. Macdonald denied any breach of contract or liability on his part.

PER CURIAM. The Court finds that Macdonald did change the hours of his trains on or about the 18th of June, without the consent of Belcourt in a manner which was not justified by the contract. As to the alleged want of access to and accommodation at the wharf at Calumet, the Court does not find the evidence sufficiently clear or free from contradiction. On the other hand, looking at the defence of Macdonald, it is true that he has a judgment against Belcourt for \$125 for moneys due in connection with this contract, but the judgment went by default, and I do not see that it is any answer to the complaint of Belcourt of a breach of contract in changing the hours of the trains at a subsequent date. For this change Belcourt is entitled to some damages, and the

seizure of the steamer which took place about the 27th or 28th June, 10 days later, does not destroy this claim. I think that I shall be doing justice between the parties by allowing the claim of Belcourt to the amount of \$105. It can be offset by him against Macdonald's judgment, but the Court here cannot pronounce compensation as it is not asked. As to the neglect to render accounts complained of by Macdonald, the agreement does not specify any date at which they should be rendered, and I cannot say that Belcourt was at this early date in June in default.

Macmaster, Hutchinson & Knapp for plaintiff.
Loranger & Co. for defendant.

SUPERIOR COURT.

MONTREAL, July 8, 1881.

Before TORRANCE, J.

BRAUDRY et al. v. BOND.

Contract—Interpretation—Insolvency.

Where a lease, made during the existence of the Insolvent Acts, was to be terminated by the insolvency of or the making of an assignment by the tenant, held, that the making of a voluntary assignment by the tenant after the repeal of the Insolvent Acts, did not terminate the lease.

The action was by landlord against tenant under a lease, of date 6th February 1878, for 5 years, from the 1st May 1878. The action began with a conservatory process to attach the moveables furnishing the house to answer for the rent of two years beginning the 1st May 1881, and assessments.

The rent had been paid up to the 1st May 1881, before the action began, and the defendant contended that his lease terminated at the last mentioned date under an assignment which he had made as an insolvent to H. B. Picken Jr., on the 31st December 1880. His plea invoked this assignment, and a clause of the lease in the following words: "In case of insolvency of said lessee or his making any assignment of estate, this lease shall *ipso facto* become null and void, after the expiry of the year then current during which such assignment is made, for the remainder of the term thereof, without notice to the assignee or to any other person or persons whatever." Plaintiffs answered the

plea by alleging that the lease was made when the Insolvent Act of 1875 and its amendments were in force, and that the clause in question had only been inserted in view of an insolvency and assignment under this Act; that the parties to the lease had not in view a voluntary assignment such as that invoked by defendant; that he was not insolvent and had not made an assignment such as contemplated by the lease; that said clause was inserted for the benefit of the lessors.

PER CURIAM. The Court holds that the answer of the plaintiffs is well founded, and that the clause in question does not apply to the present case. The plea is therefore over-ruled.

Judgment for plaintiffs.

Lacoste, Globensky & Bisailon for plaintiffs.
L. H. Davidson for defendant.

SUPERIOR COURT.

MONTREAL, July 8, 1881.

Before TORRANCE, J.

BOWES v. RAMSAY.

Malicious prosecution—Reasonable and probable cause.

A trading firm, by making false statements to a mercantile agency as to their capital, obtained a high and incorrect rating, on the strength of which they got credit for goods, which they handed over to a relative in payment of an antecedent debt, and, within a month after, a writ in insolvency issued against them. The vendor of the goods on discovering the facts, and being so advised by counsel, prosecuted the firm on the charge of obtaining goods by false pretences.

Held, that there was reasonable and probable cause for the prosecution, and an action of damages would not lie.

PER CURIAM. This is an action of damages for a malicious criminal prosecution. Plaintiff and his brother, members of a Toronto firm of A. Bowes & Co., were charged by Ramsay with having conspired to obtain from the firm of Ramsay, Drake & Dods by false pretences certain goods. Plaintiff was arrested at Toronto under a warrant issued on Ramsay's information, and brought down to Montreal by a constable, and discharged after a long preliminary examination.

The defendant pleads reasonable and probable cause for the information and prosecution. The main issue is whether the defendant had reasonable and probable cause.

The facts are shortly these: Bowes & Co., consisting of Archibald and David Bowes, went into partnership as warehousemen in Toronto in 1877. In the fall of 1877, two of the agents of the mercantile agency of Dun, Wiman & Co., called upon them in succession, and the second of these agents, Mr. Hutton, says that plaintiff represented to him that each of the partners was putting \$5,000 into the business. They were thereupon rated in the books of the agency as worth \$5,000.

On the 14th November, 1878, the firm of A. Bowes & Co. bought from defendant's firm to whom they were entirely unknown, 10 barrels of oil of the value of \$207.75. This purchase was made by plaintiff, and he referred Ramsay & Co. to the mercantile agency for a report as to the position of Bowes & Co. On the 28th November, 1878, Bowes bought more oil from Ramsay & Co., 7 barrels of the value of \$141.31. This last lot was handed to one Bowes a farmer, a relative, in payment of an antecedent debt. This fact comes out in consequence of proceedings being taken against the recipient of the oil on the subsequent insolvency of Bowes & Co., to return the oil or the value to the assignees of Bowes & Co. The Court gave an order accordingly and the oil or value was returned.

On the 26th December, 1878, Bowes & Co., were put into insolvency, this being within one month after the purchase of the second lot of oil. It was in consequence of the answers made by plaintiff to the questions put by his creditors, that the facts were put before Mr. W. H. Kerr, Q. C., of this city, with a view to criminal prosecution, and he advised a criminal prosecution and prepared an information to be sworn to by defendant and laid before the magistrate. It would appear that the magistrate after hearing several witnesses decided not to commit the plaintiff, but to discharge him. It further appears that Bowes & Co. procured a composition at 25 cents in the dollar from their creditors, bearing date 30 April, 1879. A year afterwards the county judge confirmed the discharge by his judgment of date 26 April, 1880, but with the proviso that it shall only operate and have effect as a discharge as to Archibald

Bowes in two months, namely, on and after the 26th April, 1880, and as to the plaintiff, in one month after his judgment, namely, in one month after the 26th April, 1880. These are the facts which have been very carefully put before the Court by the counsel charged with the prosecution of the present suit and its defence.

Does an action for damages lie in such a case? The important question is not whether the defendant Ramsay was actuated by malice in the criminal prosecution, though here there is evidence that he took criminal proceedings in the hope of coercing plaintiff into paying the debt, and the action would not lie without proof of malice. Nor is the important question whether the accusation by Ramsay was true or false. The important question here is whether Ramsay had reasonable and probable cause for the criminal prosecution. "Probable cause," says 2 Greenleaf's Evidence, in chapter on Malicious Prosecution, § 455, "does not depend on the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party prosecuting." Next we have the advice of counsel. "It is agreed that if a full and correct statement of the case has been submitted to legal counsel, the advice thereupon given furnishes sufficient probable cause for proceeding accordingly." *Idem*, § 459. On the whole case, the conclusion of the Court is that the plea of Ramsay has been made out. Perhaps there was nothing more than imprudence on the part of the plaintiff, but he was the means of Dun, Wiman & Co. certifying that Bowes & Co. had a capital of \$5,000. Again, the appropriation of the oil purchased within a month before a writ in insolvency issued against Bowes & Co., to pay a debt due a relative, is an unfortunate circumstance, and the conclusion of the county judge suspending the discharge shows that he was not satisfied that the insolvents had clean hands.

Action dismissed.

Doutre & Joseph, for plaintiff.

L. N. Benjamin, for defendant.

SUPERIOR COURT.

MONTREAL, July 8, 1881.

Before TORRANCE, J.

GORRIE et al. v. OGILVIE et al.

Married woman—Payment of husband's debt.

A transfer of a claim or of money made by a wife séparée de biens to a creditor of her husband, in payment or part payment of her husband's debt, is valid, and the wife is not entitled to have such transfer or payment set aside.

The question was as to the validity of a deed of transfer executed by a wife on behalf of her husband. The plaintiff authorized by her husband seeks to set aside a transfer by which she transferred to the defendant Ogilvie for Ogilvie & Co., with promise of warranty, "all her right, title and interest as one of the legatees and legal representatives of her father, the late Daniel Gorrie deceased, to the sum of \$3,000, part and parcel of the amount coming to her under and by virtue of a certain sale by authority of justice of certain real estate the property of the estate of the late Daniel Gorrie, . . . with all interest to accrue thereon." The consideration of the deed is stated to be "the like sum of \$3,000 paid in cash at the execution hereof." Plaintiff declared that no money was paid at the execution thereof; that she never received any consideration for the transfer thereof; that she never was indebted to defendant; and that in fact said deed was made as security *pro tanto* of the indebtedness of her husband to Ogilvie & Co., of which firm defendant was a partner, under the importunities and influence of her husband, acting in connivance with Ogilvie; and said transfer, she alleged, was absolutely null, and the plaintiff was entitled to have the return of all the moneys received by defendant under the same and interest.

The pretention of the defendant is that the main question is whether a transfer of a claim or of money made by a wife to a creditor of her husband, as part payment of her husband's debt, is valid. The plaintiff relies upon C. C. 1301.—"A wife cannot bind herself either with or for her husband, otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect."

Kerr, *Q.C.*, for defendant, urged that so long as no responsibility or obligation on the wife's part is involved, she is at liberty to pass deeds and do acts. Thus she can pay her husband's debts. The case of *Hogue*, insolvent, *Cousineau*, collocated, and *La Société de Construction Montarville*, was cited by Mr. Kerr; 2 Legal News

308, 9, where Mr. Justice Jetté is reported to have said: "She may make any deeds which do not involve any responsibility or obligation on her part. Thus she may pay for her husband, for that is not obliging herself for him."

PER CURIAM. The plaintiff truly says that she made the transfer in the first instance as security for her husband's obligations, but the question here is not the enforcement of her obligation, but whether having made a payment which has inured to her husband's benefit, she can have the payment cancelled. I agree with Mr. Justice Jetté that the code, C. C. 1301, does not go that length. She has chosen to give over to her husband's creditor a valuable security which has discharged her husband *pro tanto*. If she is ever called upon to guarantee the transfer under the warranty clause, the code 1301 may be invoked for her benefit, but she is not now called upon to fulfil any obligation violating C. C. 1301. Action dismissed.

L. H. Davidson, for plaintiff.

Kerr, Carter & McGibbon, for defendant.

SUPERIOR COURT.

IN INSOLVENCY.

MONTREAL, July 4, 1881.

Before MACKAY, J.

PAQUET, insolvent, CANADA GUARANTEE Co., claimant, and BANQUE D'HOCHELAGA, contesting.

Guarantee Insurance—Privilege.

PER CURIAM. In this case the Bank contests a claim by the Guarantee Company. By the dividend sheet the Guarantee Co. is collocated for \$2750. The Court was under the impression at first that the claim was well founded, but an examination of the bond shows that its terms make the Company liable *in solido* with Paquet. The two jointly and severally promise that Paquet will account for *all* that he ought, and pay *all* that he may owe. There is a limitation however, so that the Guarantee Company may not be harassed beyond \$10,000. It has paid the \$10,000 since the Bank proved, and has filed a claim for \$10,000 against the estate in bankruptcy of Paquet. It claims to rank *pari passu* with the Bank on what remains of Paquet's assets, diminishing the dividend for the bank seriously, and recouping itself over \$2000 of the \$10,000 guaranteed. Seeing that the Guarantee

Co. is debtor *in solido* for all Paquet's indebtedness it must not be allowed to *concourir* with the creditor, the Bank, but the Bank must first be paid what remains due to it, which is forty thousand dollars beyond all that Paquet's estate can pay; even after crediting the \$10,000. The dividend sheet must be reformed. Contestation maintained, with costs against the Guarantee Company.

Hutton & Nicolle, for Canada Guarantee Co.
Beique & McGoun, for contestants.

RECENT SUPREME COURT DECISIONS.

Life Insurance—Insurable Interest—Transfer—Wager Policy—Payment of Premium—One Gendron applied to respondent's agent at Quebec for an insurance on his life, and signed the application. The applicant was personally subjected to a medical examination, and the application, the medical examiner's report, together with the certificate of a friend answering certain questions put to him by the company, were transmitted to the head office at New York. The application of Gendron was acceded to, and the policy, which is set out in the declaration, executed, whereby Gendron's life was insured from the date of the policy for one year upon payment of a certain premium, and to be continued in force by the annual payment of the premium. The policy was then transmitted from the head office to the agent in Quebec, to whom the application had originally been made. The policy was not delivered for some time as Gendron was unable to pay the premium, when one Langlois, approached by Michaud, who had been entrusted by Gendron with a blank assignment, paid the premium, and thereupon the transfer of the policy was made to Langlois who received the policy and held it as the assignee of the assured. Subsequently Langlois assigned the policy to the appellant, and all premiums up to the death of Gendron were paid by the assignees of the assured. The principal question which arose on the appeal was whether this was a wager policy obtained by Gendron's assignees, and whether there was an insurable interest in it. Prior to Gendron's death the general agent enquired into the circumstances of the case, and authorized the agent, Michaud, to continue to receive the premiums from the assignee.

Held, (reversing the judgment of the Queen's Bench, Montreal, 3 Legal News, 322,) that at the time Gendron applied for an insurance on his own life, and his application was acceded to, and the policy sued upon executed, he effected *bona fide* an insurance for his own benefit, and as the contract was valid in its inception, the payment of the premium when made had relation back to the date of the policy, and the mere circumstance that the assignee (the insurance having been effected without his knowledge, and there being no collusion between the parties) paid the premium and obtained an assignment, could not make it a wager policy. (Gwynne, J., dissenting).—*Vezina v. New York Life Insurance Co.*

Writ of Prohibition to Municipal Corporation—Assessment Roll.—Appeal from a judgment of the Court of Queen's Bench for the Province of Quebec, (3 Legal News, 274,) maintaining a writ of prohibition issued in the Superior Court of the Province of Quebec, at the instance of the respondents, to prohibit the appellants from proceeding to sell the property of the respondents for taxes due under a certain assessment roll of 1876.

In 1875, a valid assessment roll for the municipality in which the properties were situated was made, which by law continued to be in force for three years. On complying with certain formalities, the council had power to amend such roll. In 1876, another roll was made, and the evidence showed that it was a triennial roll which was made, and not an amended roll as contended for by the appellants. By their *requête libellée* the respondents demanded that a writ of prohibition should issue out of the court addressed to the defendants, enjoining them from selling the real property of the plaintiffs so seized, or to proceed in any manner upon the said assessment roll of 1876, or to collect any taxes in virtue of that roll, and that the proceedings taken against the plaintiffs' property might be declared to be illegal, void and of no effect.

Held, per Henry, Taschereau and Gwynn, JJ., that respondents were entitled in this case to an order from the Superior Court to restrain the municipal corporation from selling their property as prayed for, and as it made no difference what name was given to the proceedings in the case, the writ of prohibition

issued in the case should be maintained. *Contra* Ritchie, C.J., Strong and Fournier, JJ. The Court being equally divided, the judgment appealed from was affirmed, but without costs.—*Cole et al. v. Morgan et al.*

RECENT ENGLISH DECISIONS.

Criminal Law—Trial—Cumulative Sentence Valid.—The appellant was indicted for perjury; the indictment contained two counts, the first alleging perjury committed on the trial of an action of ejectment in 1871, the second alleging perjury committed in some proceedings in 1868. The assignments of perjury in the two counts were not identical, but the object of the proceedings in 1868 and in 1871 was the same, namely, to establish the appellant's right to certain landed estates. The jury found a general verdict of guilty upon both counts of the indictment, and the appellant was thereupon sentenced to seven years' penal servitude upon each count, the second term to commence upon the expiration of the first term.

Held (affirming the judgment of the court below,) that such a sentence might be lawfully passed, although the statute (2 Geo. II, chap. 25, § 2, as amended by the subsequent acts,) makes seven years' penal servitude the maximum punishment for a single perjury. *Held*, further, that the statute of George II does not require the infliction of a common law punishment in addition to that prescribed by the statute. Cases referred to: *Regina v. Wilkes*, 4 Burr. 2527; *Rex v. Robinson*, 1 Mood. C. C. 413; *Tweed v. Lipscombe*, 60 N. Y. 559; *Young v. The King*, 3 T. Rep. 98; *Rex v. Jones*, 2 Campb. 131; *Rex v. Kingston*, 5 East, 41. House of Lords, March 11, 1881. *Castro v. The Queen*. Opinion by Lord Chan. Selborne, Lord Blackburn and Lord Watson, 44 T. Rep. (N. S.) 350.

THE PERILS OF DOCTORS.

The case of *DeMay v. Roberts*, Michigan Supreme Court, June 8, 1881, 9 N. W. Rep. 146, so far as we know, is unique, at least since the time when Clodius in disguise penetrated the mysteries of the *Bona Dea*. It was there held that where a physician takes an unprofessional unmarried man with him to attend a case of confinement, and no real necessity exists for the latter's assistance or presence, both are

liable in damages; and it makes no difference that the patient or husband supposed at the time that the intruder was a medical man, and therefore submitted without objection to his presence. The physician testified that the layman, who bore the misleading name of Scattergood, accompanied him reluctantly, on foot, on a dark and stormy night, when the roads were too bad to drive or ride a horse, to carry a lantern, an umbrella, and some instruments. The physician told the husband that he had brought Scattergood along to help him carry these things, and Scattergood was admitted without objection. The house was only fourteen by sixteen feet in size, and the doctor and the intruder were necessarily in the same room with the suffering lady. At the doctor's request, Scattergood once gave some trifling manual assistance, but did not obtrude himself, but behaved in a proper manner. The court remarked: "Dr. DeMay therefore took an unprofessional young unmarried man with him, introduced and permitted him to remain in the house of the plaintiff, when it was apparent that he could hear at least, if not see all that was said and done, and as the jury must have found, under the instructions given, without either the plaintiff or her husband having any knowledge or reason to believe the true character of such third party. It would be shocking to our sense of right, justice and propriety even to doubt that for such an act the law would afford an ample remedy. To the plaintiff the occasion was a most sacred one, and no one had a right to intrude unless invited, or because of some real and pressing necessity which it is not pretended existed in this case. The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation. The fact that at the time she consented to the presence of Scattergood, supposing him to be a physician, does not preclude her from maintaining an action and recovering substantial damages upon afterward ascertaining his true character. In obtaining admission at such a time and under such circumstances without fully disclosing his true character, both parties were guilty of deceit, and the wrong thus done entitles the injured party to recover the damages afterward sustained, from shame and mortifica-

tion, upon discovering the true character of the defendants." The action was brought by the wife.—*Albany Law Journal*.

THE PRACTICE OF LAW.

The address of Hon. J. M. Woolworth, before the Iowa State Bar Association, May 10th, contains a remarkably ingenious account of the manner in which custom becomes law. Judge Woolworth also utters the following which is timely: "The practice of law, considered merely as a business, is the least satisfying of all human employments. Considered as a business merely, I say; that is, prosecuted like any craft, or trade, or adventure, solely for the purpose of gain. He who plies this art in that spirit stands in the market and lets himself to hire, and at the end of the day the fee in his hand is his reward; or if with a great enterprise of viciousness, he conceives the law as a dexterous art, contrived by lawyers for lawyers, in order to transmute the property of others into their own possessions, he answers St. Paul's description of certain Gentiles who were 'given over to work all uncleanness, with greediness.' The profession of law is not a craft, or a trade, or a venture. It is not a contrivance for the benefit of lawyers. It cannot be worthily or even decently practiced simply for gain. I do not say that the lawyer may not take rewards for his work; it ought to bring him gain—the gain at once of 'flowing fees' and honor among his fellow-men; and he ought to demand and care for these his dues. But they must be the incident of his service; they must come of themselves and not by much seeking. If in the act of plying this art the counsellor be intent on the fee, if he pursue it as his one object of desire, no matter how much it may increase and multiply, it will be a poor, sordid thing in his hands. On the other hand, if he will keep it in its due place, it will be the *honorarium* of the Roman jurisconsult and the English barrister. In this commercial age when wealth is held before the eyes of men as the one object of desire, and the getting and displaying of it is the chief end of man, the lawyer, whose life is in the very wildest of the strife, is apt to lapse into the mercenary spirit. They who resort to him are busy in getting or recovering or fortifying the possession of property. The

strifes of his days and the studies of his nights are to serve them in their pursuit of money. The very atmosphere of his office is redolent of gold. In the midst of such influences and constraints what is so natural as that he relax his hold upon any conception of the law which is not mercenary; how shall he resist the solicitations to make merchandise of it and pursue it as men follow trade?"—*Albany L. J.*

THE LATE LORD JUSTICE JAMES.

Of this distinguished English judge, who died on the 7th June, the *Solicitors' Journal* says:—"In Lord Justice James the nation has lost a judge who possessed in no ordinary degree that integrity which, as Lord Bacon says, is above all things the 'portion and proper virtue' of judges. He had a passionate loathing for injustice, oppression and trickery; restrained only by the strong common sense which taught him that settled rules of law must not be displaced to avoid individual hardship. In knowledge of real property law he was probably unrivalled on the bench, and in force and clearness of diction he had few equals. His grasp of the facts of the most complicated case was singularly rapid and accurate. Perhaps it was this facility of apprehension which led him sometimes into a rather too early expression of opinion as to the legal bearing of facts. He was not always 'swift to hear and slow to decide.' He was not always patient with counsel whose sense of duty to their clients led them to combat the view which he had taken up. But with all this, he was a judge who inspired great confidence. His opinion, if sometimes prematurely expressed, was seldom wrong; and it was usually supported by a clear enunciation of principle and a careful analysis of cases. His place at Lincoln's Inn will be hard to fill."

GENERAL NOTES.

In the New York Court of Appeals there is a two hours' limit to the addresses of counsel, but more than one hour is seldom taken.

Ex-Judge Tyler, of California, the other day, finding himself opposed by a woman lawyer, Mrs. Clara S. Foltz, lost his temper, and told her that "a woman's proper place was at home, raising children." The lady answered him promptly: "A woman had better be engaged in almost any business than raising such men as you are, sir."

The Legal News.

VOL. IV.

JULY 23, 1881.

No. 30.

EMPLOYER AND EMPLOYEE.

Quebec gives us a case, *Ouimet v. Verville*, unique of its order under the law of master and servant. The secretary-treasurer of the school commissioners of a rural parish, St. Jean des Chaillons, received from the local government of Quebec, for the use of his commissioners, a cheque for \$163.51. Banking facilities do not abound in the country parts of this Province, and Monsieur Verville, the secretary-treasurer, tried in vain to get the cheque cashed in the parish. He could find no one able or willing to give current coin or notes for the Provincial sign manual. What was to be done? The poor school mistresses had not been paid their dues for a long time back, and were in sore need of their miserable pittance. In this perplexity Mr. Verville betook himself to the chairman of the school commissioners, a dignity which may be assumed to be synonymous with all that is solid and respectable. The chairman proved to be the very person to solve the difficulty. He was not in funds himself, but he was about to visit the capital on the following day, for a little relaxation, and he undertook to get the cheque cashed. So Mr. Verville cheerfully handed over the slip of paper to his superior officer, and went away without a thought of coming calamity. The chairman next day embarked for Quebec, duly reached his destination, and, on the good rule of attending to business before pleasure, went to the office of the Bank of Montreal and got the cheque cashed. It appeared that there was a trifle of \$23.51 due to himself by the Board, and having first prudently separated this sum from the rest, he put the balance, \$140, in a particular pocket, to be handed to the secretary on his return home, and then gave himself up to enjoyment. What followed on that ill-omened day is not accurately known, probably never will be. The chairman, according to the statement of counsel, owned to having imbibed "four or five, five or six glasses of liquor," and later on, went to a crowded public

meeting to divert himself by listening to the speeches. After enjoying this favorite rustic entertainment for an indefinite period, and probably being not the least lusty in his applause of the orators of the evening, our chairman resorted to a tavern to refresh himself with a glass of beer, and there made the discovery that the \$140 of school money had disappeared from its place of deposit—his own funds do not appear to have been touched.

Consternation no doubt pervaded St. Jean, and especially its poor school-mistresses. The ratepayers assembled and wrathfully demanded the dismissal, not of the chairman, but of the unfortunate secretary. The commissioners dismissed him accordingly. But this was not punishment enough. The Superintendent of Public Education, acting for the school commissioners, sought to hold unhappy Monsieur Verville responsible for the loss. This seems to be an improvement on the appeal from Philip drunk to Philip sober. It was equivalent to the chairman sober holding his subordinate responsible for the conduct of the chairman unbending himself. Well might the learned judge before whom the case was tried exclaim, "Such a pretension appears to me one of revolting injustice." Law and justice are happily found to be on the same side, and the employee has been freed from responsibility for a loss which was brought about by no fault or negligence on his part, but which resulted from the act of the chairman of his employers. The case having been taken to appeal, the decision of the lower court in favor of the secretary-treasurer has been affirmed.

CICERO.

Anthony Trollope, though not always profound, is never dull. The following is a passage from his recent life of Cicero:—"What a man he would have been for London life! How he would have enjoyed his club, picking up the news of the day from all lips, while he seemed to give it to all ears! How popular he would have been at the Carlton, and how men would have listened to him while every great or little crisis was discussed! How supreme he would have sat on the treasury bench, or how unanswerable, how fatal, how joyous, when attacking the government from the opposite seats! How crowded would have been his rack with invita-

tions to dinner! How delighted would have been the middle-aged countesses of the time to hold with him mild intellectual flirtations; and the girls of the period, how proud to get his autograph, how much prouder to have touched the lips of the great orator with theirs! How the pages of the magazines would have run over with little essays from his pen! 'Have you seen our Cicero's essay on agriculture? That lucky fellow, editor — got him to do it last month!' 'Of course you have read Cicero's article on the soul. The bishops don't know which way to turn.' 'So the political article in the *Quarterly* is Cicero's?' 'Of course you know the art-criticism in the *Times* this year is Tully's doing?' But that would probably be a bounce. And then what letters he would write! With the penny post instead of travelling messengers at his command, and pen instead of wax and sticks, he would have answered all questions and solved all difficulties. He would have so abounded with intellectual fertility that men would not have known whether most to admire his powers of expression or to deprecate his want of reticence."

BENCH AND BAR IN NEWFOUNDLAND

The narratives of travellers, when strictly tested, are not often found to be literally accurate. The inducement to divert their readers is so great that travellers' tales resemble much the accounts of current events, transmitted over the wires by correspondents, who seem to labor under an absolute disability to keep within the region of fact. The bench and bar of Newfoundland have lately suffered from the romancing pen of a travelling peer, Lord Dunraven, who favored the Island with a brief visit; was kindly treated, and requites the hospitality extended to him by striving to make his entertainers ridiculous. The lord is ably answered by a Newfoundland correspondent:—

"After a slight account of our cod and seal fisheries, Lord Dunraven goes on to give a humorous description of a voyage he made northward, in company with one of our judges and a number of barristers who were on circuit. I may explain that, as the extent of our roads is yet limited, a coasting steamer is chartered to convey the judges, lawyers and officers of court to the different localities where, according to statute, a court is held twice a year. As Lord

Dunraven had a difficulty in getting a passage to the hunting-grounds which he wished to visit, by the regular steamer, the judge then going on circuit in that direction kindly consented to take him as a passenger, and not only so, but to oblige him, he started a day and a half before the regular time, and at no small inconvenience to himself and the members of the legal profession who were on board, he conveyed Lord Dunraven directly to his destination. I need hardly say that the utmost attention and hospitality was shown his Lordship while on board. It was not very gracious, therefore, on the part of Lord Dunraven, in return for his kindness, to write of the voyage as follows:—'As far as I could see, there was very little work for the court to do. We would stop occasionally, apparently at any nice likely-looking spot for a malefactor, and send on shore to see if there was any demand for our commodity, namely justice. Generally we were informed that the inhabitants did not require any justice at present, but that perhaps if we would call again another time a little later, we might be more fortunate; and then we would give three hideous steam whistles by way of a parting benediction, and plough our way through the yielding billows to some other settlement, where, if we were lucky, the court would divest itself of oil skin coats and sou'westers and go ashore to dispose of the case or cases to be tried.' Now this is entirely a fancy sketch, as I am in a position to affirm most positively, having the authority of the judge who was on board, and some of the barristers for what I write. I am far from suggesting that Lord Dunraven has stated knowingly and designedly the things which never took place; but it is evident he has written the sketch from memory after an interval of more than four years, and that he has unconsciously mixed up with his account reminiscences of what he has heard or seen elsewhere, perhaps in the Western States of America, and localised some of those experiences here by a strange confusion of memory. Perhaps we have here an illustration of what physiologists call 'unconscious cerebration.' It is, however, a fact that the steamer, on the occasion referred to, conveyed Lord Dufferin and the others from St. John's direct to his destination, "Hall's Bay, without calling at any intermediate port, so that the inquiries for malefactors, and the trying of

cases on the way, did not occur. Indeed, such ludicrous incidents were impossible. When a judge goes on circuit there are certain towns and settlements where, at the time appointed, he invariably opens the court, whether there are cases to be tried or not, just as is done in England. I may add that judicial proceedings are conducted here with every regard to propriety and decorum; and that the bench and the bar of Newfoundland, in regard to ability, legal attainments and that dignified and gentlemanly demeanour which we expect in men belonging to one of the learned professions, will compare favorably with the bench and the bar of any other British colony.

"In regard to this voyage, however, his Lordship's memory has played him a still more fantastic trick than in the foregoing instance. He tells us that the party amused themselves with 'reading dime novels,' and 'playing cards in the stifling saloon below.' 'There was something rather comical in the whole proceeding.' 'To see eminent counsel staggering about the slippery deck in long boots and Guernsey frocks, and the highest functionary of the law playing profane games of cards in his shirt sleeves, condescending to exchange remarks concerning the weather with grimy stokers and tarry-breeched seamen, produced a feeling of somewhat irreverent amusement.' Here again his Lordship's reminiscences of Newfoundland have got 'tangled,' and some funny stories heard elsewhere are, no doubt, unconsciously related as having happened here. I have the highest authority for stating that on the passage not a single game of cards was played by anyone. There would have been no harm in such a thing, but the voyage proved to be a very rough one, and amusements of this kind were not attempted. The judge, to whom he attributed such vulgar conduct, is a highly esteemed gentleman, of great ability, and, in private life, quite incapable of any such indecorum as his Lordship has been pleased to credit him with. That the barristers were dressed in 'Guernsey frocks' is also ludicrously untrue. In fact the only amusing incident on the passage was supplied by his Lordship himself, who had a habit at table of taking the potatoes from the dish with his fingers—a practice which created what he calls 'a feeling of somewhat irreverent amusement' when witnessed in a peer of the

realm, whom ordinary mortals look upon with wonder, not unmixed with awe. Still the legal gentlemen were too polite to publish an account of this little peculiarity on the part of the peer. With them he has not been equally courteous. He describes the steamer as a "harbour tug," so as to convey the meanest impression of the whole affair. The *Hercules* is a small coasting steamer of about 130 tons, fitted up to carry passengers, and on this occasion her saloon and cabins accommodated twenty passengers. His Lordship afterward chartered her to carry him from St. John's to Halifax. To call her a "harbour tug" is misleading. Now we sometimes find vulgar "penny-a-liners" abusing hospitality, and where they have been kindly and courteously received, revealing what occurred in the confidence of familiar intercourse, and turning their hosts into ridicule for the amusement of their readers, but we did not expect to find an accomplished writer and a gentleman of high position like Lord Dunraven stooping to like conduct."

THE RIGHT OF ASYLUM.

Having regard to the recent outrages of Nihilism, and to the manner in which they have notoriously received active sympathy from Russia and other residents in several Continental States, it is natural that the question of the extradition of political offenders should engage a considerable amount of public attention. The German Parliament has already expressed its approbation of international treaties for the prosecution and extradition of persons guilty of attacks upon the Chiefs of States; and a proposal to the same effect was recently made in the Austrian Reichstag. Russia, again, has taken the obvious step of suggesting a conference to deliberate on practical protective measures. In these circumstances it is not surprising that a report should have arisen that representations had been made to our own Government respecting the right of asylum for political offenders in this country. Such representations would be by no means novel, for nothing, perhaps, has on previous occasions of similar character given rise to more bitter feelings in the minds of other nations than the liberty which our laws afford to foreign refugees. That Lord Granville was able, in reply to a question in the House of Lords, to pronounce this report unfounded, is probably

due to the fact that the sentiments of this country on the matter are now too well known to encourage any such representations.

From time immemorial, it may be said, England has granted to persons of every rank, condition or party, exiled from their own country on account of their political conduct or opinions, an inviolable asylum, subject to their good behavior while resident here, and to their obedience to our municipal laws. Many instances might be mentioned in which this principle has been asserted, but it will be sufficient to recall one or two of the most important.

When, in the year 1802, Napoleon demanded that our Government should expel certain individuals whose political conduct and views were offensive to the French authorities, Lord Hawkesbury replied in the following terms: "His Majesty expects that all foreigners who may reside within his dominions should not only hold a conduct conformable to the laws of the country, but should abstain from all acts which may be hostile to the government of any country with which His Majesty may be at peace. As long, however, as they conduct themselves according to these principles, His Majesty would feel it inconsistent with his dignity, with his honor, and with the common laws of hospitality, to deprive them of that protection which individuals resident in his dominions can only forfeit by their own misconduct."

Another notable assertion of the same liberal doctrine occurred in 1852, when, in answer to the urgent demands of various Continental States that certain conspiracies alleged to be organized by political refugees in England, should be promptly suppressed by our Government, Lord Granville, then foreign secretary, replied in a circular issued to the principal Powers, that "By the existing laws of Great Britain all foreigners have the unrestricted right of entrance and residence in this country; and while they remain in it are, equally with British subjects, under the protection of the law; nor can they be punished except for an offence against the law, and under the sentence of the ordinary tribunals of justice, after a public trial, and on a conviction founded on evidence given in open court. No foreigners, as such, can be sent out of this country by the Executive Government, except persons removed by virtue of treaties with other States, confirmed by act

of Parliament, for the mutual surrender of criminal offenders. British subjects, however, or the subjects of any other State, residing in this country, and therefore owing obedience to its laws, may, on conviction of being concerned in levying war against the Government of any State at amity with Great Britain, be punished by fine and imprisonment." "While, however," the despatch continued, "Her Majesty's Government cannot consent, at the request of foreign governments, to propose a change in the laws of England, they would not only regret, but would highly condemn any attempt on the part of foreign refugees in England to excite insurrection against the governments of their respective countries. Such conduct would be considered by Her Majesty's Government as a flagrant breach of the hospitality which those persons enjoy."

So bold a refusal of their demands produced a great irritation among the Powers to whom the circular was addressed, and the laws of this country were at the time subjected to severe criticism; but here at least the despatch was accepted by the lawyers and statesmen as a sound exposition of the national doctrine.

In the following year the subject underwent a memorable discussion in the House of Lords, and Lord Lyndhurst, in introducing the debate, used language very similar to that already quoted. "Foreigners," he said, "residing in this country, as long as they reside here under the protection of this country, are considered in the light of British subjects, and are punishable by the criminal law precisely in the same manner, to the same extent, and under the same conditions, as natural born subjects of Her Majesty. In cases of this kind, persons coming here as foreign refugees from a foreign state, in consequence of political acts which they have committed, are bound by every principle of gratitude to conduct themselves with propriety. This circumstance tends greatly to aggravate their offence, and no one can doubt that they are liable to severe punishment."

The principles enunciated in these cases have since been fully maintained, and were in 1871 again laid down in answer to a remonstrance of the Spanish Government. Of foreign dictation or interference in the matter of domestic legislation the people of this country have ever shown themselves peculiarly impatient, as was

demonstrated by the well known events of 1858, when a supposed concession to French compulsion proved sufficient to overthrow a ministry. We need not, therefore, go far to seek the reasons which have induced our government to decline the conference now proposed by Russia. Seeing that its avowed object is to restrict the liberty and facilitate the apprehension of foreign fugitives, the decision of our ministers is wise and will commend itself to the nation.

But while we are thus tenacious of the freedom accorded by our laws to exiles, it behooves us not to forget our duty to other governments. It can hardly be denied that on some occasions we have been singularly careless in the encouragement of revolution, and even in cases where restrictive laws have been enforceable, we have been slow to sanction their being carried out. Let it be remembered at the present time that, so long as these liberal views prevail, it is—in the words of Lord Granville—"the more incumbent upon us to exert all legal powers to prevent acts prejudicial to foreign and friendly governments, more especially with regard to murders, whether such murders or attempts to murder are directed against private individuals, or against sovereigns and chiefs of state."—*Law Times* (London).

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, March 31, 1881.

TORRANCE, RAINVILLE, JETTE, JJ.

[From S.C., Iberville.

FAIRVIEW v. WHEELER, and WHEELER et al., interveners.

Lease—Conditional sale.

Where a piano was sold conditionally upon the price being paid by the purchaser, held that the proprietorship was in the vendor so long as the price was not paid to him.

TORRANCE, J. The question here is as to the proprietorship of a piano claimed by the plaintiff from the defendant as simply leased by her to him. The interveners, his son and daughter, claim it under a title derived from the defendant. The defendant held the piano under a lease from the plaintiff, which promised to sell him the piano conditionally upon his paying the price,

namely, \$425. The Court at St. Johns, Iberville, held that the proprietorship of the plaintiff was proved and that the intervention of the son and daughter, claimants, should fail. I hold here that the law and equity of the case are entirely in favour of the judgment, which should be confirmed.*

Judgment confirmed.

P. Lanctot, for plaintiff.

Lacoste, Globensky & Bisailon, for interveners.

SUPERIOR COURT.

MONTREAL, March 31, 1881.

Before TORRANCE, J.

MARTIN v. THE DOMINION OIL CLOTH CO.

Injunction—Trade Mark—Adulteration of goods.

This was an action for an injunction and an account, and also in damages. The complaint set out an agreement of date 22nd February, 1877, by which the plaintiff undertook to furnish to defendants his dry brilliant body green, and also consented that his trade mark should be used by defendants for five years on the labels for said green after it was ground by the company in pure refined linseed oil, which the company undertook to do, and plaintiff further bound himself to furnish the company with said dry green in any other shade than the one before mentioned that might be desirable and procurable from the manufacturers in Europe. And the company bound themselves to grind the brilliant body green always pure in the best refined linseed oil in the usual consistency of blind green, to wit: green used for window blinds, and to furnish it to plaintiff at the rate of 15½ cents per pound, put up in cases of 40 tins from one to five pounds weight, and to allow plaintiff the difference in cost when he ordered the same in larger quantities, and agreed to fill plaintiff's orders promptly, and to credit plaintiff with one per cent. on each pound of green sold by them to other parties, and to make and furnish plaintiff with a monthly statement of such sales, and to account for and pay the amount found to be due to plaintiff from said sales. Plaintiff complained that the

* Authorities of plaintiff:—Thomas & Ayles, 16 L.C. J. 309; *Webster & Clarke* (in Review, from Iberville; *Renaud & Robillard, & Ratelle*, opposant, C.C.Mr., (Rainville, J.); *Larombière*, Art. 1184, No. 70; 25 Demolombe, n. 543.

company failed to furnish plaintiff with monthly statements and to pay to the latter the amount coming to him; that the company greatly adulterated the dry green furnished by plaintiff with divers inferior materials which took away the brilliancy of the green and impaired its coloring power, and more especially had used in such adulteration sulphate of barytes and other inferior materials, and sold and delivered large quantities of said inferior green, and did put upon the same the trade mark of plaintiff; that by so doing the rights of plaintiff had been greatly interfered with, and he had suffered great loss. The conclusion of plaintiff was that the company be enjoined to cease using said trade mark upon any of said green so manufactured by the company; that the company be condemned to furnish to plaintiff a true account of all the sales made monthly by the company of said green, and to pay over to plaintiff the sum which might be found to be due to plaintiff, and that the company be condemned to pay to plaintiff damages, namely, \$5,000.

The company pleaded that ever since entering into said agreement they had ground pure and in the best refined linseed oil in the usual consistency of a blind green, the dry green furnished by plaintiff, and had fulfilled every part of said agreement on them binding, but that plaintiff had altogether failed to fulfil his part of the agreement, and instead of furnishing dry green as by said agreement he was bound to do, he directed the employees of the company to mix together certain ingredients by him named in certain proportions by him indicated, in view of producing the said dry green or an article similar thereto, which said directions of plaintiff had been minutely followed. That the company had never used the trade mark of plaintiff upon, or for the purpose of designating any other green than that furnished to the company by plaintiff, or that produced as aforesaid by the admixture of different ingredients under the direction of plaintiff. That moreover the company, on the 12th December, 1879, accounted to plaintiff for one cent per pound upon all the said green sold by the company to other parties, the amount of said account being for 7224 pounds of said green, to wit: the sum of \$72.24 which was placed to the credit of plaintiff who was in-

debted to the company in a greater sum, to wit: in the sum of \$110.52, balance due by plaintiff to defendant upon an account for the price and value of goods, wares and merchandizes by the company to plaintiff sold, and delivered at different times previous to the date of the institution of the action; that since the rendering of this account the company had not sold any of the said green; that in and by their protest the company notified the plaintiff that they had a certain quantity of said green still on hand, bearing the trade mark of plaintiff, and were ready to deliver the same to him on being reimbursed the cost price thereof, and the company prayed that the sum of \$72.24 be declared compensated by the said sum of \$110.52, and plaintiff's action dismissed.

PER CURIAM. On the issues raised between the parties, many witnesses have been examined, and I have no difficulty in finding that the dry green furnished by plaintiff was greatly adulterated. Mr. Woods, the manager of the company, says this was done by the express direction of the plaintiff. I have an insuperable difficulty in believing this, because it was destructive of the plaintiff's business, and plaintiff received from the company an inferior article of little value and was nevertheless charged the same price as if it were the pure article intended by the contract.

I call attention to the following evidence of the witness Woods on the adulteration of the dry green:—

"Q. Did you hear Dr. Girdwood and Mr. Logie and Mr. McArthur say that the one was worth about 18 cents and the other only from 4 to 6 cents per pound?

"A. I believe I did.

"Q. Did you consider yourself entitled to charge the fifteen and a-half cents mentioned in the contract for the brilliant body green for this adulterated green?

"A. We did, but we offered to make good to Mr. Martin any difference in quality on account of having done so.

"Q. Was it the quantity or the value which was reduced?

"A. The value.

"Q. But you continued to charge the fifteen and a-half cents mentioned in the contract?

"A. Yes."

Again at p. 12.

"Q. Do you consider that that was a proper brilliant body green for the market?"

"A. I considered that it was nothing of my affair. That Mr. Martin had told me to mix sulphate of Barytes with it and that I did so."

"Q. You made it worth from 5 to 6 cents per pound, while it was worth from 15 to 16 cents per pound before?"

"A. I don't admit that it was only worth that price."

And so on.

I cannot help here remarking on the peculiarly emphatic expressions used by this witness in answer to questions which were put to him. Once he is asked, "Are you positive, &c.?" Ans. "I swear it absolutely. I swear that he told me to put barytes in to make the colour. My instructions to my foreman then were to put barytes in. Under my solemn oath I state that Mr. Martin represented that brilliant body green to be pure without barytes in it whatever."

Again at p. 7. "Will you swear that the 'colour or tint,' &c."

"Answer. On my solemn oath I swear, &c., &c."

Again at the following page, the reverse of page 7:—

"Question. Did you understand that there 'was nothing but the pure green to be used?"

"Answer. I do, upon my solemn oath."

Again at pp. 12, 13:

"Q. Of that lot in which the special instructions were given, did you furnish the sample of it as produced to Mr. Martin or to Mr. Baillie?"

"A. Before changing it?"

"Q. No, after changing it?"

"A. When I received it I mixed it according to the written instructions. Mr. Martin came down and I believe that I showed him the result. I believe that he saw that the shade was very dark, and I said that I could not get the shade. I said that it would have to be lightened and that barytes was the thing to lighten it and he said, put barytes in. I swear that on my solemn oath."

It is no uncommon thing for a counsel to remind a witness that he is under oath, in putting him a question, but it is a most unusual thing for a witness who is under oath, to endeavor to add emphasis to his statements, to invite attention to his affirmations—by vain repetitions—by swearing anew in so many words—upon my solemn oath—I swear abso-

lutely—that such are the facts. It is a significant circumstance that the credit of this witness is attacked by several witnesses, and on the other hand, his veracity is testified to by persons who say they know nothing against his credit and that they would believe him on the whole. I find on the evidence of record and given in open court, that the injunction asked for by plaintiff should be granted him and that general damages should be awarded. On the other hand the account offered by the company is accepted and the balance of \$38 credited to them, and will go in deduction of the general damages.

The action does not claim special damages, but the recourse of plaintiff, if any he have, is reserved for such damages.

A. & W. Robertson for plaintiff.

Béique & McGoun for defendants.

RECENT DECISIONS AT QUEBEC.

Principal and agent—Liability of employee—Cheque.—The respondent, secretary-treasurer of the school commissioners for the parish of St. Jean des Chaillons, having received a government cheque for school purposes, and not being able to get it cashed in the parish, handed it to the chairman of the commissioners to be cashed at Quebec. The latter obtained the money, the greater part of which was shortly after stolen from his person. *Held*, that there had been neither negligence nor fault on the part of the secretary-treasurer, and that he was not responsible for the loss.—*Ouimet v. Verville*, (Q. B.) 7 Q. L. R. 34.

Chose jugée—Ayant cause.—L'acquéreur n'est l'ayant cause du vendeur que pour ce qui a précédé la vente. Le jugement, qui, après la vente, établit le montant dû par le vendeur pour balance du prix de son acquisition du même immeuble, ne peut pas être opposé à l'acquéreur, et ne fait pas preuve contre lui du montant pour lequel l'immeuble par lui acquis est hypothéqué. Le tiers détenteur peut opposer à une poursuite hypothécaire contre lui les paiements faits par son vendeur.—*Dubuc v. Kiddon et al.*, 7 Q. L. R. 43.

Trial—Verdict—Presence of prisoner at argument on writ of error.—Where a prisoner has been indicted for burglary (*vol avec effraction*), a verdict for receiving stolen goods (*recel*) cannot be rendered, and in such case the verdict

may be quashed on writ of error. A plaintiff in error in jail undergoing sentence must be brought into Court by *habeas corpus* at the hearing of the case.—*St Laurent v. Reg.*, 7 Q. L. R. 47.

Municipality—Procès-verbal.—Where a portion of a municipality has been detached in order to form a separate municipality, the rate-payers within the detached portion are no longer bound by any *procès-verbal* under which they were previously obliged to maintain any part of a road within the portion from which they have been detached (M. C. Arts. 5 and 90).—*Deschenes v. La Corporation de Ste Marie*, 7 Q. L. R. 50.

Procedure—Exhibits—Instrument recited in pleading.—A plaintiff failing to file with his declaration the exhibits alleged in support of his demand may do so afterwards, and so long as the position of the parties remains unchanged, without leave of the court, provided notice be given to the opposite party. 2. If the exhibits that ought to have been filed with any pleading subsequent to the declaration are not so filed they cannot afterwards be filed, without the consent of the opposite party or leave of the court. 3. If an instrument recited in a pleading was lost or destroyed before the date of such pleading, such destruction or loss ought to be alleged.—*Bussière v. Gaboury*. Opinion by Meredith, C. J., 7 Q. L. R. 51. But McCord, J., in *Filion v. Corribeau*, 7 Q. L. R. 66, allowed an exhibit referred to in the declaration to be filed at *enquête*, without previous notice to the opposite party: "considérant que les articles 99, 103 et 106 C. P. C. n'ont rapport qu' à la procédure qui précède la contestation en cause, et que leur intention n'est que de permettre au défendeur de prendre communication des pièces du demandeur avant de produire ses défenses; considérant qu'en produisant ses défenses et son articulation de faits avant que le demandeur ait produit la sentence arbitrale, l'intervenante, défenderesse, a montré qu'elle n'avait pas besoin de la production de la dite sentence pour pouvoir plaider à l'action, et a renoncé à l'avis prescrit, en sa faveur par l'art. 106, et se trouve du reste sans intérêt à exiger le dit avis."

Municipal taxes.—The Crown is assessable for municipal taxes on property occupied by it as

tenant.—*Corporation of Quebec v. Leaycraft, & Attorney-General*, intvg., 7 Q. L. R. 56.

Sheriff's sale—Deposit.—When an order, under C. C. P. 678, is made requiring bidders at a sheriff's sale to make a deposit, such order ought to be published as one of the conditions of the sale. A failure to publish such condition may be taken advantage of by the defendant by a petition *en nullité de décret*.—*Robitaille v. Drolet*, 7 Q. L. R. 67.

RECENT ENGLISH DECISIONS.

Forgery—Adoption—Neglect to give notice by one whose name is forged.—F. forged the name of the appellant to a bill of exchange, and discounted it with the respondent's bank. Upon the bill becoming due, the bank communicated with the appellant, but he allowed a fortnight to elapse before he informed them that his signature was a forgery. The position of the bank was not in any way altered for the worse during the interval. *Held* (reversing the judgment of the court below), that the appellant was not liable on the bill. *Freeman v. Cook*, 2 Ex. 654, approved. *Urquhart v. Bank of Scotland*, 9 Scot. Law Rep. 508, distinguished. House of Lords, Feb. 11, 1881. *McKenzie v. British Linen Co.* Opinion by Lord Chanc. Selborne and Lords Blackburn and Watson. 44 L. T. Rep. (N. S.) 431.

Marriage—Evidence of, from cohabitation.—When the question is whether a certain marriage has or has not taken place, and the fact of cohabitation is established, together with reputation of marriage, a presumption is created in favor of the marriage having taken place, which can only be rebutted by strong and weighty evidence to the contrary. *Broadalbane Case*, L. R., 1 H. of L. Sc. 199; *Piers v. Piers*, L. R., 2 H. of L. Cas. 331; *De Thoren v. Attorney-Gen.*, L. R., 1 App. Cas. 686. Ch. Div., April 9, 1881. *Fox v. Bearblock*. Opinion by Fry, J. (44 L. T. Rep. [N. S.] 508.)

GENERAL NOTES.

From an article in the *N. Y. Herald*, which has been shown to us, it appears that the judges of the Supreme Court of New York State receive \$17,500 each, of the Superior and Common Pleas Courts \$15,000, and of the Marine Court \$10,000. The Surrogate, the Recorder and the City Judge are paid \$12,000 each.

The Legal News.

VOL. IV. JULY 30, 1881. No. 31.

THE INSURANCE APPEAL.

We learn that the appeal to the Privy Council in the test case of *Parsons v. The Queen Insurance Co.*, 3 Legal News, p. 326, has been argued at considerable length before the Judicial Committee of the Privy Council. The hearing occupied three days ending the 9th instant. Their Lordships reserved judgment, and it is probable that the result will not be known till November next, after the long vacation.

CANCELLATION OF CONTRACTS.

We are indebted to a telegraphic despatch for the following piece of information, as important as it is concise :—

"LONDON, July 20.—In the House of Commons last night an amendment of the Land Bill enabling the Land Court to quash unfair leases concluded since 1870, and forced on tenants by the threat of eviction or undue influence, was carried by 201 to 109."

Indolent people have been receiving with indifference the signs of approaching revolution in England. They have readily allowed themselves to be nursed into a comfortable sense of security, by the almost too transparent fallacies which have been put forward as an apology for the recent propositions to interfere with the rights of property. It is hardly possible to suppose that any one will be so stupid as to believe that "threat of eviction" or "undue influence," a conveniently loose expression, of very recent invention, and forged for the purposes of fraud, can be made to do duty as a reason for annulling a contract. This, however, is really what is meant. In Mr. Gladstone's organ, the *Guardian*, it was called "undue pressure—as, for example, to permit a lease to be quashed, where since 1870, a landlord has presented to his tenant the oppressive alternative of lease or eviction." To high moralists like the writer in the *Guardian* and Mr. Gladstone it is an oppression tantamount to fear to use a threat of legal procedure. The doctrine may be true but, if so, it is a new evangel.

The contrary doctrine has been that of civilized man all over the world. It has been the same in heathen Rome and in Christian Europe. Pothier says : "*La violence qui peut donner lieu à la rescision du contrat, doit être une violence injuste, adversus bonos mores. Les voies de droit ne peuvent jamais passer pour une violence de cette espèce,*" etc., Oblig., § 26. This is the doctrine of the Roman Law (ff. Quæmet. causa, l. 3, § 1.) and of our code. Social order is in great peril when it becomes necessary to recall to mind such obvious truths.

R.

HOMICIDE.

A curious question in connection with the law of homicide recently came before the High Court at Calcutta. In *Empress v. Gonesh Dooley*, Ind. L. R., 5 Cal. 351, two snake-charmers had been tried for murdering a boy. They were exhibiting to a crowd a venomous cobra, whose fangs (as they knew) had not been extracted, and one of them placed it on the head of a boy whom they had selected to assist them in showing off their dexterity in snake charming. The boy took fright, and in trying to push away the snake was bitten by it on the finger, and he died from the wound. The jury had acquitted both prisoners, on the ground that the exhibition of snake-charming was authorized by custom, and that they had not intended to kill the boy. The sessions judge thought that they had caused the boy's death by an act of gross negligence, and he referred the case to the High Court. Mr. Justice McDonell held that the prisoner who put the snake on the boy's head had been guilty of "culpable homicide not amounting to murder," and not of the minor offence of "causing death by negligence," because he knew that the act was likely to cause death (although he had no intention of causing it), and that the other prisoner was punishable for abetting to homicide.—*Solicitor's Journal*.

VENDOR AND PURCHASER AS REGARDS FIRE INSURANCE.

The decision of the Master of the Rolls in *Raynor v. Preston*, 14 Ch. Div. 297; 43 L. T. Rep. N. S. 18, has been affirmed by the Appeal Court in a considered judgment, Lord Justice James dissenting. The circumstances, as our readers may perhaps remember, were these :

The vendor of a freehold house, at the date of

the contract for sale, was the holder of a policy insuring the house against fire; the house was burnt down in the interval between the date of the contract and the time fixed for completion of the purchase; the vendor received the insurance money from the office; and the question was whether the purchaser was entitled, as against the vendor, to the benefit of the insurance, either by way of abatement of the purchase money or reinstatement of the premises. The Master of the Rolls decided against the purchaser's claim.

We have before stated our opinion that, both on principle and on the authorities, the decision of the Master of the Rolls was correct. Our opinion is now confirmed, and having considered the reasons given by Lord Justice James in support of the opposite view, his dissent does not in any degree diminish our confidence that the law on the subject has been correctly laid down by Lords Justices Brett and Cotton, who constituted the majority in the Court of Appeal.

We say, with the sincerest respect for the able and admirable senior Lord Justice, that, being aware of his strength, and that he would adduce and urge in support of his dissent everything that could be adduced and urged, we have been unable to feel the force of his reasoning, and therefore are rather fortified than otherwise in our original opinion. Lord Justice Cotton, in a careful judgment, in which Lord Justice Brett substantially concurred, held that, apart from any question arising out of the 14 Geo. 3, c. 78, a contract of fire insurance was a personal contract of indemnity collateral to the land; that the contract for sale passed all things belonging to the vendors appurtenant to or necessarily connected with the use and enjoyment of the property mentioned in the contract, but not the benefit of a contract of fire insurance, and that (as was conceded) if there had been no insurance, the destruction of the house by fire would have been no answer to the vendor insisting on specific performance without compensation; that the contract of insurance was not a contract of repair—but to pay a sum of money, that by express condition in the policy, if not by the general law, the assignee, by way of purchase of the thing insured, was not entitled to the benefit of the fire policy. Lord Justice Brett pointed out that a fire policy in this respect must be governed by the same considerations

as a marine policy, as to which it had been held that the assignee of insured goods, who had never contracted for the benefit of the insurance was not entitled to any benefit, and that the assignor, not retaining any interest, was not himself entitled to any benefit: *Powles v. Innes*, 11 M. & W. 10. This was the turning point of the case.

If the contract of insurance were collateral the purchaser was really out of court. On this question Lord Justice James was of a different opinion, holding that a fire policy is in effect a contract that if a fire happen, the insurance company will make good the actual damage sustained by the property. In support of this he said that he was not aware of any case in which, on an insurance by a tenant for life, the value of the life interest had ever in any way been regarded by an insurance office in paying on its policies; and that the provisions of the 14 Geo. 3, c. 78, enabling any person interested to require the office to lay out the money in rebuilding, tended in the same direction to support his opinion.

There were, however, other contentions of the appellant with which the court had to deal. It was said that between the date of the contract and the time for completion, the vendor was merely a trustee for the purchaser, that he only obtained the insurance money from the office on the strength of his legal title. Here, again, Lord Justice James differed from his brethren, holding that a vendor, after the date of the contract for sale, is strictly and properly a trustee, and, therefore, that any benefit which accrued to him enured for the advantage of the beneficial owner. Lords Justices Cotton and Brett pointed out that a vendor, pending the completion of the contract, was a trustee only in a qualified sense, the purchaser's right depending on his acceptance of the title and the payment of the purchase money, and that it was because of the uncertainty as to the fulfilment of these conditions that the office could not defend an action on a fire policy by an unpaid vendor: see *Collingridge v. The Royal Exchange Corporation*; 37 L. T. Rep. N. S. 525. From this it would appear that it is only because of the uncertainty above mentioned, and the impossibility of predicating whether the conveyance will ever be completed, that it is no defence for an insurance company to show that the policy holder suing is an unpaid ven-

dor. It would also appear that after the completion of the purchase, when it is proved by the event that the vendor, when he received the money, had no equitable interest in the thing insured, it must follow, as in *Darrell v. Tibbitts*, 42 L. T. Rep. N. S. 796, that the insurance company is entitled to recover back the insurance money. Though it was not necessary to decide this point, the Court of Appeal, as well as the Master of the Rolls, in *Raynor v. Preston*, expressed an opinion that the vendors could not, as against the office, retain the insurance money.

As to the point taken by Lord Justice James in regard to an insurance by a tenant for life, or other limited owner, being entitled to receive the full amount of the damage by fire, we should dispute that as a general proposition he is so entitled.

Take the case of the death of the tenant for life, or the failure of the limited ownership before the claim on the policy is settled. Could it be contended that damages were to be assessed without regard to the fact that the policy holder's interest was at an end, and that the real amount of mischief he had sustained had been ascertained by the event?

It may well be that, where a limited owner insures, and his interest is a subsisting one, his insurable interest is not limited to the value of his limited interest, on the ground that in order to his full compensation he requires the insurance money for repairing the property injured in order to his enjoyment thereof, in specie. Thus, in *Simpson v. The Scottish Union Insurance Company*, 1 H. & M. 618; 8 L. T. Rep. N. S. 112, Sir W. P. Wood said that he agreed "that a tenant from year to year having insured would have a right, under the statute, to say that the premises should be rebuilt for him to occupy, and that his insurable interest is not limited to the value of the tenancy from year to year."

In regard to the application of the statute of Geo. III, Lord Justice Cotton declined to give an opinion whether purchasers pending the completion of a contract are persons "interested" within its meaning, but held that even if they were, the act only gives a right to insist on the money being applied in reinstating, and that insistence was essential to the right. This point was expressly so decided by Sir W. P. Wood in the case last cited.

If we may venture an opinion on the question left open by Lord Justice Cotton we should be inclined to say that, although purchasers pending completion are persons interested in the thing insured, yet the statute can only apply where, in fact, at the date of the fire, there is an interest remaining in the person originally insured, and that the completion of the purchase relating back to the date of the contract conclusively shows that the vendor, at the date of the fire, had no insurable interest whatever, and that he was merely a trustee for a purchaser who, as such, is not entitled to the benefit of the insurance contract.—*Law Times*, (London.)

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, June 28, 1881.

Before TORRANCE, J.

DIOTTE V. THE CITY OF MONTREAL, & THE CITY OF MONTREAL V. LATOUR et al.

Obstruction in street—Negligence—Damages.

PER CURIAM. This is a claim for damages for an alleged obstruction in the street *Maison-neuve* by which the plaintiff was thrown out of a cart and injured. The City called in Latour & Co., contractors, as *garans*, and these pleaded negligence on the part of the man driving the cart. The accident happened on the 11th October, 1879. Latour & Co. were the contractors for the construction of Ste. Brigitte Church, and had a quantity of material in the street by permission of the City, with a stipulation to have a light there. There is contradictory evidence as to whether there was negligence on the part of Larochelle who drove. One witness who was with him says there was, and the other witness that there was none. But it was undisputed that there was a pile of stone and timber in the street, that the accident was caused thereby, and that there was no light placed there by the contractors, and the evening was dark. It would have been a prudent and proper precaution to inclose the stone and other materials within a fence, and to have had a light there as is the practice in most civilized communities. This was not done. I have no hesitation in holding that the City and contractors should answer in damages. The

demand is for about 76 days from 11 Oct., 1879, to the date of the institution of the action. The Court assesses these damages at \$250, for which judgment goes against the City and *en garantie* against Latour & Co.

Lacoste, Globensky & Bisailon, for the plaintiff.

R. Roy, Q.C., for the city.

Champagne & Nantel, for the defendants *en garantie*.

SUPERIOR COURT.

MONTREAL, June 28, 1881.

Before TORRANCE, J.

FULLER v. FARQUHAR et al., and STEWART, Jr.,
mis en cause.

Insolvent surety—Supplementary list of creditors.

PER CURIAM. This was a rule against Robert Stewart, Jr., for coercive imprisonment. He had been condemned to pay Fuller the sum of \$434.94, with interest and costs, as security for one Henry Parker, under a bond in appeal. Stewart answered the rule by pleading that on the 6th July, 1877, he had been put into insolvency under the Insolvent Act of 1875, and had included the claim of Parker among his liabilities under a supplementary statement of date 17th April, 1879. Stewart cited s. 61 of the Insolvent Act, but it does not cover his case. In the first place, he has had no confirmation of discharge from debts; and secondly, the supplementary list of creditors was not furnished in time to allow of his creditor obtaining the same dividend as other creditors. Other matters of form were urged against the imprisonment by Stewart, but it is unnecessary to refer to them. Stewart remains liable to imprisonment as a judicial surety, and the rule should be declared absolute.

Maclaren & Leet, for plaintiff.

R. A. Ramsay, for Stewart.

SUPERIOR COURT.

MONTREAL, June 28, 1881.

Before TORRANCE, J.

GADBOIS v. LAFORCE et al.

Malicious Prosecution—Compensation of damages.

This was an action of damages by which plaintiff seeks compensation for the loss of a valuable horse, and for an alleged malicious criminal prosecution. The defendants had a

judgment against Gadbois for \$71, and took in execution the horse in question, and subsequently abandoned the execution and lodged a seizure in the hands of the guardian, and under this seizure the horse was sold for the sum of \$87. Gadbois alleged that the horse was worth \$300 to \$400, and that defendants had agreed with him to buy the horse for \$150 cash, and to discharge the judgment; that they had broken this agreement, and wrongfully deprived him of the horse by deceit and treachery and abuse of the process of the court. As to the criminal prosecution, it arose out of the charge of conspiracy made by defendants, that Gadbois had by an opposition obstructed their proceedings. The defendants answered the charge as to the sale of the horse, that they had only used the ordinary process of the court, in order to obtain payment of the judgment, and they denied the alleged agreement to purchase the horse on the terms stated by plaintiff. As to the criminal prosecution there was, they said, reasonable and probable cause for it, and at any rate Gadbois in June, 1876, had instigated a criminal prosecution against them, and they had thereby suffered damages more than compensating any damages which Gadbois could pretend to claim from them.

PER CURIAM. The record is a bulky one, the action having begun in March, 1877, and 37 witnesses have been examined, during a period extending over near four years. I would say here what I have said before, that it is to be regretted that the enquête should have occupied so long a time as nearly four years. Coming to the facts, I see no legal proof of the agreement to discharge the judgment by private sale of the horse. The matter involved more than \$50 and could not be proved by verbal testimony. At any rate, the evidence is quite contradictory, for the evidence for the defence is directly opposed to that for the demand. Then, as to the accusation that the defendants abused the process of the Court, it is not proved. They used the remedies provided by law, and Gadbois could have avoided their operation by simply paying the debt. As to the malicious criminal prosecution charged against the defendants, the evidence on this head is quite unsatisfactory, as there is no documentary evidence of the prosecution. There is not produced any copy of the complaint and warrant

upon which the prosecution began. Admitting, however, that Gadbois had a grievance here, there is evidence of his having criminally prosecuted the defendants for conspiracy. This is admitted and justified by his answer to the plea, and there is a judgment of record showing that the indictment on his prosecution was quashed, and there the matter seems to have ended. The prosecution by the plaintiff may well be set against the prosecution instigated by the defendants. In both, the attorneys of the parties were included. I would further say, that there appears to have been abuse of the process of the Court by Gadbois, who put in an opposition *à fin d'annuler* in June, 1876, which was dismissed in October, and another opposition *d'annuler* in November, which was also dismissed in November, 1876. These judgments were *chose jugée* as to the private bargain for the sale of the horse. The Court has no hesitation in saying that this action should be dismissed.

Durand, for the plaintiff.

T. Bertrand, for the defendant.

COURT OF REVIEW.

MONTREAL, May 31, 1881.

SICOTTE, RAINVILLE, BUCHANAN, JJ.

[From S.C., Montreal.

BRUNET et al. v. LACOSTE et al.

Salé—Resolution—Non-payment of interest.

The inscription was from a judgment of the Superior Court, Montreal, March 31, 1881, Torrance, J. His honor, in rendering the judgment *a quo*, made the following observations:—

"This was an action by Alexis Brunet, *filz*, and Marie Emelie Brazier, his wife, and Alfred Brunet, curator to the substitution created under their marriage contract, against the executors of the late Charles Wilson and against Alexander Molson, vendee of Wilson. It appeared that Brunet *filz* on the 11th March, 1866, gave to Wilson, now deceased, the promise of sale of an immoveable situated on Bonaventure street, so soon as the Corporation of the City of Montreal should have expropriated it for the widening of Saint Bonaventure street, which expropriation there was reason to believe would take place shortly. Meanwhile Wilson was to enter into possession. The consideration of the sale was £1100, of which £200 was received

by the father of Brunet *filz*, and the balance of £900 was to be held by Wilson so long as the corporation should not have made the expropriation, paying interest meanwhile to Madame Brunet née Brazier. The complaint of Brunet and wife was firstly that the interest was not paid, namely, \$256.41. They further represented that on the 11th March, 1866, the expropriation by the city had been agreed to by the municipality, and notice given thereof in the newspapers, but the expropriation could not be definitely settled if the majority of the interested subject to assessment for the expropriation should oppose themselves to it, and Wilson by his acts caused an opposition to such expropriation so that it was prevented, and by the terms of the promise of sale, the payment of the price was to take place shortly, and so likewise the expropriation as set forth in the deed, and the plaintiffs said that they had a right to claim the purchase money and also the rescission of the promise. They also complained of the deterioration of the property by Wilson and the now defendants, to the amount of \$1000, and they concluded accordingly.

The executors pleaded that the promise of sale was followed by tradition, and thereby Wilson became proprietor, and as to the purchase money, £900, it was only payable on the expropriation, which had not taken place; that it was untrue that Wilson had prevented it; that Wilson might have taken proceedings to protect his rights in the widening of the street, but he did nothing to oppose the legal expropriation; that further, the property was shortly to be expropriated; that said Wilson had done all that he was bound to do; that he had sold to the defendant Molson, who had undertaken to pay the interest due, \$256.41, but had neglected to do so, and the defendants consented that judgment should go against them for \$256.41. Apart from the documentary evidence, the evidence of record was very short. The city clerk under examination proved the passing of a resolution in 1866 by the city council, for the widening of St. Bonaventure street, provided the whole cost be borne by the land belonging to parties interested in or benefited by the improvement. By the law then in force, the majority of persons interested must concur in the proposed improvement, and it then failed for want of a majority. It

was only in September, 1879, that the city council finally adopted a report recommending the widening of the street on different terms, namely: That one-third of the cost should be borne by the corporation and two thirds by the parties interested. The name of Mr. Wilson does not appear in these proceedings. On the whole, I have no difficulty in holding that the plea of the defendants should be maintained. Wilson entered into possession under a promise of sale, and no reason is given why the sale should be rescinded. Wilson became proprietor by his possession so far as the plaintiffs were concerned, and he interposed no obstacle to the expropriation."

The plaintiffs inscribed in Review, assigning the following reasons for the reversal of the judgment:—

"1. Because the defendant having failed to pay the interest for more than two instalments, the said plaintiffs were entitled to an *action résolutoire* (Troplong, Vente, vol. 1, Nos. 596, 646; Gilbert sur Sirey, Art. 1654, notes 26, 28; Aubry & Rau, vol. 4, p. 398; Laurent, vol. 24, No. 336 et seq.)

"2. Because the judgment should have rescinded the said sale for want of payment of interest, instead of purely and simply granting a personal condemnation against the defendants.

"3. Because said personal condemnation merely entitles the plaintiffs to a *décret* or sale by sheriff of said property, instead of being reinstated in the possession of the same by a *jugement résolutoire* upon refunding to the estate Wilson the £200 paid cash on account of the purchase money.

"4. Because under the terms of the marriage contract neither Alexis Brunet personally nor his wife had any right to sell the said lot of land before the expropriation of the whole or portion of the said lot was determined on and had in fact taken place, and that his sale to Hon. Chs. Wilson was premature and unauthorized under the said marriage contract and the terms of the substitution therein stipulated; and that for this reason the other plaintiff Alfred Brunet as tutor to the said substitution was at all events entitled to the said rescission and *jugement résolutoire*."

The Court reformed the judgment, as follows:—

"Attendu que les demandeurs réclament la résolution de l'acte de promesse de vente par A. Brunet à l'hon. Charles Wilson reçu le 14 mars 1866, et de l'acte entre les mêmes parties en date du même jour intitulé, convention, et de l'acte de vente consenti par le dit hon. Chs. Wilson, au défendeur Alex. Molson de la propriété mentionnée au dit acte de promesse de vente et reçu le 12 avril 1872, à raison du fait que les défendeurs n'ont pas payé la balance du capital et une somme de \$252 d'intérêts échus;

"Considérant que les dits demandeurs n'ont pas droit d'exiger maintenant le capital, mais que le défaut de paiement des intérêts donne au vendeur ou ses représentants le droit de demander la résolution de la vente;

"Considérant qu'il y a erreur dans le dit jugement du 31 mars dernier, le réformé et révisé, et procédant à rendre celui qui aurait dû rendre la cour de première instance;

"Déclare la dite vente résiliée et résolue, et annule le dit acte de promesse de vente, et le dit acte intitulé convention, et le dit acte du 12 avril 1872, en autant qu'il se rapporte à la dite propriété décrite au dit acte de promesse de vente comme suit, etc., et condamne les défendeurs à qualité d'exécuteurs testamentaires et administrateurs de la succession de feu l'hon. C. Wilson à livrer et abandonner le dit immeuble aux demandeurs, si mieux n'aiment les dits défendeurs sous 15 jours de la signification du présent jugement payer aux demandeurs la dite somme de \$252 avec intérêt, etc., et les dépens de l'action telle qu'intentée en cour supérieure," etc.

R. & L. Laflamme, and Girouard & Wurtel, for plaintiffs.

Lacoste, Globensky & Bisailon, for the Executors.

Barnard, Monk & Beauchamp, for A. Molson.

RECENT SUPREME COURT DECISIONS.

Agreement—Additional parol term—Conditions—Carriers—Wifful Negligence.—The plaintiffs (respondents) sued the defendants (appellants) for breach of contract to carry a quantity of petroleum in covered cars from London to Halifax, alleging that they negligently carried the same upon open platform cars, whereby the barrels in which the oil was, were exposed to the sun and weather and were destroyed. At the trial a verbal contract between the plaintiffs and the defendants' agent at London was proved,

whereby the defendant agreed to carry the oil of the plaintiffs in covered cars with quick despatch. The oil was forwarded in open cars, and delayed at different places on the journey, in consequence of which a large quantity was lost. On the delivery of the oil the plaintiffs signed a receipt note, which said nothing about covered cars, and which stated that the goods were subject to conditions endorsed thereon, amongst which was this: "that the defendants would not be liable for leakage or delays, and that oil was carried at owner's risk."

Held, per Ritchie, C.J., and Fournier & Henry, JJ., that the loss did not result from any risks by the contract imposed on the owners, but loss arose from the wrongful act of the defendants in placing the goods on open cars, which act was inconsistent with the contract they had entered into and in contravention of their duty as carriers.

Per Strong, Fournier, Henry & Gwynne, JJ., affirming the judgment of the Court of Common Pleas, Ontario, that the verbal evidence was admissible to prove a contract to carry in covered cars, which contract the agent at London was authorized to enter into, and which must be incorporated with the writing, so as to make the whole contract one for carriage in covered cars, and therefore defendants were liable.—*Grand Trunk Ry. Co. v. Fitzgerald et al.*

Shipping note—Fraudulent receipt of agent for goods not received—Liability of Company.—One W. C., who was defendants' agent at Chatham, and also a partner in the firm of B. & Co., in fraud of the defendants, caused printed receipts or shipping notes in the common form used by the defendants' company, to be signed by his name as defendants' agent, in favor of B. & Co., for about 1200 barrels of flour, no flour at that time having been shipped, and no flour ever having been delivered to the company to answer the said receipts. The receipts or shipping notes acknowledged that the company had received from B. & Co. the barrels of flour addressed to the plaintiffs, and were attached to six drafts drawn by B. & Co. at sixty days, and accepted by the plaintiffs. W. C. received the proceeds of the drafts, and afterwards absconded. In an action to recover the amount of the drafts,

Held, that the act of W. C. in issuing a false and fraudulent receipt to B. & Co., of which firm

he was a member, for goods never delivered to the company to be forwarded, was not an act done within the scope of his authority as defendants' agent, and therefore the defendants were not liable (Fournier & Henry, JJ., dissenting).—*Erbb et al. v. Great Western Ry. Co.*

RECENT DECISIONS AT QUEBEC.

Subrogation — Tiers détenteur — Surety.—Jugé,

1. Que, mis en regard, la caution doit être préférée au tiers détenteur, et que la subrogation qu'obtient ce dernier, en payant le créancier, ne lui donne pas de recours contre la caution.

2. Que ce privilège appartient aussi bien à la caution solidaire qu'à la caution simple.—*Bilodeau v. Giroux* (C.C.), 7 Q. L. R. 73.

Report of Distribution — Registration.—The hypothec granted by a purchaser and registered before the registration of his title to the immoveable hypothecated, will rank after the vendor's privilege, although the latter was registered after the 30 days.—*Chrétien v. Poitras* (S.C.), 7 Q. L. R. 81.

Registration—Contract of Marriage.—Jugé, 1. Que l'enregistrement du contrat de mariage requis par l'Acte de Faillite de 1875, pour permettre à la femme d'un commerçant un recours contre les biens de son mari pour les avantages que lui faisait son contrat, n'était que pour le cas de mise en faillite du mari et de distribution de ses biens en vertu de l'acte même, et que, pour tout autre recours, ses droits étaient régis par le Code Civil.

2. Que l'Acte de Faillite de 1869 d'abord, puis celui de 1875, n'ont conservé les dispositions sous ce rapport de l'Acte de 1864 que pour les contrats qui auraient dû être enregistrés pendant qu'il était en force, et non pour ceux faits depuis.

3. Que le rappel de l'Acte de Faillite de 1875 laisse à la femme, qui n'a pas enregistré son contrat dans les délais voulus par cette loi, tous les recours que lui permet le Code Civil.—*Joseph et al. v. Fortin et al.* (Cour Supérieure), 7 Q. L. R. 87.

Tierce Opposition—Interest of opposant.—Jugé, que toute partie dont la créance est apparente au dossier peut demander que le fol adjudicataire soit condamné à payer la différence entre sa folle adjudication et l'adjudication définitive, et que le jugement ainsi obtenu, n'attribuant à

la partie qui l'a poursuivi son obtention d'une portion du montant qu'il comporte, ne peut être révoqué par tierce opposition du débiteur de cette créance qui est le donateur du fol adjudicataire, et qui l'a garanti contre son existence.—*Ross v. Corrigan* (Court of Review), 7 Q. L. R. 91.

Contract—Engineer's certificate.—A covenant in a contract for the construction of railway works, between the chief contractor and a sub-contractor, that the qualities and quantities of the work done by the sub-contractor, and the amount of the payments to be made by the chief contractor to the sub-contractor, should be ascertained and determined by an engineer to be named by the chief contractor, is a valid and reasonable covenant.

2. The contractor could not have the advantage of the said covenant, as regards works done by the sub-contractor, not alleged by either of the parties to have been done under the contract, although alleged and proved to have been done in connection with and whilst the works contracted for were in progress.—*Savard v. McGreevy* (Ct. of Review) 7 Q.L.R. 97.

Location ticket—Trespass.—The "location ticket," or instrument in the nature of a sale from the crown, of the plaintiff being virtually a sale conveying ownership, he had a right to recover the value of timber cut by others upon the land, notwithstanding that according to the conditions the plaintiff had no right to the timber himself. Even if the location ticket were a mere license of occupation and did not convey ownership, the plaintiff being allowed by law to "maintain suits in law or equity against any wrong-doer or trespasser as effectually as he could do under a patent from the Crown," would still have a right to recover the value of the timber, notwithstanding the said condition.—*Dinan v. Breakey* (Ct. of Review), 7 Q. L. R. 120.

Executors—Solidarity.—Les exécuteurs testamentaires conjoints, qui ont pris indivisément possession des biens de la succession, non seulement doivent un seul et même compte, mais sont solidairement tenus au paiement de son reliquat.—*Hoffman v. Pfeiffer*, (C.S.), 7 Q. L. R. 125.

charter party—Deviation.—The primary obligation of a ship under charter is to proceed if possible, to the place named in the charter-party; but it is not necessary, in order to free the ship from this obligation, and to substitute an alternative destination, that she should be prevented by a permanent physical obstruction, if the obstruction is such as to cause a delay so unreasonable as to make the prosecution of the voyage impossible from a mercantile point of view. By a charter-party it was provided that a ship of the respondents should carry a cargo of timber from the Baltic to the Surrey Commercial Docks, "or so near thereto as she may safely get and lie always afloat," and should deliver the same to the appellants on payment of freight, "the cargo to be received at port of discharge as fast as steamer can deliver." When she arrived in the Thames the Surrey Commercial Docks were so crowded that she was not able to be received in them, and it appeared from the evidence that she would not have been admitted for many weeks. She accordingly took up her position in the river, and ultimately discharged her cargo into lighters. In an action brought by the owners against the charterers for demurrage, *held*, (affirming the judgment of the court below), that the delay was so great as to make it unreasonable for the ship to wait for admission into the docks, so that the alternative in the charter-party came into operation, and the voyage was at an end when the ship was moored in the river ready to discharge her cargo, the charterers' liability began from that date. Cases referred to: *Brown v. Johnson*, 10 M. & W. 331; *Ogden v. Graham*, 1 B. & S. 773; *Samuel v. Royal Exch. Ins. Co.*, 8 B. & C. 119; *Shield v. Wilkins*, L. R., 5 Ex. 304; *Schillize v. Derry*, 4 E. & B. 873; *Metcalfe v. Britannia Iron W. Co.*, L. R., 1 Q. B. D. 613; *Parker v. Winslow*, 7 E. & B. 942; *Bastifell v. Lloyd*, 1 H. & C. 388; *Hillstrom v. Gibson*, 8 Ct. Sess. Cas., 3d ser. 463; *Cappen v. Wallace*, L. R., 5 Q. B. D. 163; *Moss v. Smith*, 9 C. B. 94; *Geipel v. Smith*, L. R., 7 Q. B. 404; *Jackson v. Union Mar. Ins. Co.*, L. R., 8 C. P. 572; *S. C.*, 10 C. P. 125; *Hadley v. Clark*, 8 T. R. 259; *Burmester v. Hodgson*, 2 Camp. 483; *Randall v. Lynch*, id. 352. House of Lords, Jan. 13, 1881. *Dahl & Co. v. Nelson & Co.* Opinions by Lords Blackburn and Watson. (44 L. T. Rep. [N. S.] 381.)

RECENT ENGLISH DECISIONS.

Maritime law—Obligation of ship to adhere to

The Legal News.

VOL. IV. AUGUST 6, 1881. No. 32.

TAKING CASES ON SPECULATION.

We print elsewhere an extract from *The Nation*, summarizing a controversy between Judge Countryman and a United States contemporary on the subject of contingent fees. We may remark that the law in the Province of Quebec appears to be more rigorous than amongst our neighbors, for it has been positively ruled by our highest provincial tribunal, that a lawyer is not allowed to bargain that he shall have a share of the proceeds of the suits which he carries on (*Dorion & Brown*, 2 Legal News, p. 214). Mr. Justice Ramsay remarked in that case: "Such a bargain has never been maintained in England, and cannot be here."

If the rule were otherwise, it may be remarked that the attorney who had stipulated for a share of the winnings would be virtually a party to the suit, and the consequence would be that under our Code of Civil Procedure, art. 176, the judge might be recused if related or allied to the attorney "within the degree of cousin-german inclusively."

We append the opinions of two well known jurists, Messrs. Dillon and Cooley:—

Judge Dillon writes: "A delicate sense of propriety hardly consists with taking a case 'on speculation,' as I understand the phrase. I have never taken such a case nor a case upon an *expressed* contingent fee. Most professional charges, however, are *sub modo* contingent, that is, a lawyer charges more for the same skill and labor where they lead to a successful result than where they do not. Exceptional cases may justify a contingent fee; but the tendency of the practice and the abuses resulting from it are such that it ought not to be favorably regarded."

Judge Cooley writes: "1. A member of the bar is a minister of justice. He is licensed to assist the court in the administration of the law; and in the performance of his special functions he puts legal claims and defences in due form for an orderly determination, assists in eliciting the truth upon legal issues, aids the

court by his investigations and arguments to right conclusions upon the law, and attends to the execution of the judgments which are awarded. As experience is thought to demonstrate that a just result is most likely to be reached when each party to a controversy has his special counsel to examine, prepare and present his side, the lawyers called in must assume antagonistic positions, but each is supposed to have his attention directed to the final attainment of a right conclusion, and the profession itself has no justification for its existence except as it fulfills its mission as above indicated.

"2. In the performance of professional functions, the lawyer owes duties to his client, to the court, and to the State. To his client he owes fidelity and unreserved confidence; to the court he owes respect, obedience, frank and truthful advice, and generous support, and to the State he owes the duty of making his office, like that of the judge, conducive to the general good by means of a just administration of law.

"3. Clothed with such functions, and charged with such important duties, a lawyer is permitted to charge a reasonable compensation for his services, which is sometimes regulated in advance by the law, and sometimes left to negotiations or the testimony of witnesses after the services are performed. In many cases lawyers have not been content with this reasonable compensation, but have entered into arrangements with their employers for contingent fees, on the no cure no pay plan of medical charlatans, or have stipulated, when suing for the recovery of property or damages, that they shall receive in case of success a certain proportion of the recovery in lieu of fees. As such arrangements are most often made with persons of limited means, who can ill afford the expense of unsuccessful litigation, they are made to wear a benevolent aspect, as arrangements whereby injured poverty may be enabled to obtain its due. But that they are corrupting, and affect injuriously all the relations which the lawyer enters into is believed to be unquestionable.

"4. The first injurious consequence of such a practice is that it tempts lawyers to deal deceitfully with those who go to them for advice; to express doubts of results when they feel none, to suggest difficulties which they do not really anticipate, to magnify the probable

cost of litigation; in short, to do anything rather than express a frank opinion of the actual case and its probabilities, with a view if possible to bring the client to the point of proposing a part of the property or damages claimed, if by means thereof he shall be put in possession of the remainder. If, for example, the lawyer can so far discourage his client as to obtain from him an offer of one-half of property worth \$20,000 for the performance of services worth not to exceed \$500, and success seems reasonably certain, he is manifestly interested to the extent of \$9,500 to deal disingenuously with his client; and if the practice is recognized as legitimate, the temptation will often prove too great to be resisted. If suit is instituted without any such arrangement, there is then the temptation to permit delays, annoyances, trouble and cost to the client that might be avoided, with a view to the same end; and no doubt some lawyers who consider themselves high-minded and honorable unconsciously lose the spur to diligence in their suits, when discouragement to their clients seems likely to prove more profitable to them than would the energetic pursuit of a remedy. Thus the practice invites and tempts the lawyer to conceal from the client his real views, and to antagonize the interest of the client; a condition in which the law contemplates he shall never be placed.

"5. A further injurious consequence is that it takes from the lawyer the feeling that he is a minister of justice, and enlists his selfishness in a way that precludes his making a just administration of the law his first consideration. The lawyer's legitimate fee is payable irrespective of the result, and he is supposed to occupy a position from which he can contemplate the controversy with a desire that the correct rule of law shall be applied and the truth be expressed in the judgment, whether the result to his client be favorable or unfavorable. The policy of the law is that neither his feelings nor his interest shall be so far enlisted as to tempt him to desire injustice; but a contingent fee makes him a party in desire and anxiety; he becomes disqualified to be the adviser of the court, and the high sense of honor that should actuate all his professional conduct is blunted by the bribe that tempts his fidelity to justice. The court thus loses its proper reliance, and the

State loses in great measure the advantages anticipated from this body of officers.

"6. A third injurious consequence is that it leads to the bringing of many suits that ought never to be brought. Such bargains are most often met with in suits for alleged negligent injuries. In the majority of these, corporations are defendants. Many of the suits are justly brought and justly result in substantial recoveries; others are instituted in reliance, not upon justice or the law of the case, but upon the effect of appeals to passion or prejudice. These are often taken as mere ventures, as one might invest in a lottery ticket or in the exploration of an unknown land for possible mineral wealth. Perhaps no other class of suits does so much toward bringing the jury system into contempt, or toward creating a feeling of antagonism between aggregated capital on the one side and the community in general on the other; and lawyers who bring the suits are interested in making the most of this feeling. In no small degree this affects the public confidence in legal proceedings; corporators are made to believe that justice for them is not to be obtained from juries, and the public is made to believe that courts very often improperly interpose to annul just verdicts against great corporate monopolies. And when the court is censured for administering the law impartially, the lawyer who, unaffected by the interest or passion of his client, ought unhesitatingly to give the court his moral support, is found to be himself a suitor in the client's name, and his expressed disappointment and anger, which the public do not know are interested, are vastly more effective in weakening the hold of the court upon public confidence than could be any complaints of the suitor whose interests were known to be at stake. These evils are present more or less in other cases, but are conspicuously present in these.

"7. A further injurious result is that it affects the mind as all gambling does, and not only renders the judgment untrustworthy, but begets a disinclination for the somewhat monotonous routine of daily professional life. If only the customary fee is at stake, it may confidently be expected that the lawyer will bring a cool judgment to the consideration of a proposed suit; but it is easy to see merits when a possible fortune awaits the lawyer at the conclusion;

and whoever is accustomed to take such chances is in great danger of coming after a time to look upon the administration of the law as the turning of a wheel of a lottery, where any venture, however unpromising, may come out a prize. Such a lawyer gradually loses confidence in fundamental and enduring principles; his judgment is confused in the hopeful contemplation of possibilities, when it should seize hold upon and cling to legal verities, and it becomes wholly unsafe and unreliable. Safe legal advice can only be given by one who comes to the consultation in a judicial frame of mind, and dismisses for the time all such selfish considerations as would tend to lead the mind to a particular conclusion. And while this seems plain and unquestionable, it is no plainer than that a lawyer becomes untrustworthy in judgment in proportion as he permits his sense of honor and professional fidelity to be subordinated to his personal interests.

"8. The practice, then, is injurious to the cause of justice, to the court and to the lawyer himself. Rare good fortune may in some cases make it result in pecuniary prosperity, but it must be at such sacrifices as the teachings of the profession should secure one against a willingness to submit to. Under such circumstances it would seem that if poor persons need assistance to enforce their substantial rights, and are unable to pay for it, a lawyer, properly imbued with a sense of the just nature of his calling, will prefer to give assistance as a matter of charity, rather than place himself in a position that antagonizes the interest of the client, at the same time that in great degree it incapacitates him from performing the highest and most honorable of his duties, namely, those which are owing to the court and to the law itself."

THE LAW OF FORGERY.

A sensible decision has been rendered by the the Court of Cassation in Austria, under the law of forgery. The circumstances were these: Caroline J., a waiter in the service of Colonel P., took a blank check from his check-book, and got her son to fill it up for an amount of 200 florins, date it, sign Colonel P.'s name to it, and present it to S. M. Rothschild for payment. The filling up of the blank check was awkwardly done, and the signature did not in the least resemble

that of Colonel P. The forgery was, therefore, detected and payment refused. The parties being indicted and brought to trial, the lower court directed a verdict of acquittal, on the ground that the false check was not at all adapted to deceive. The Government appealed, and the Court of Cassation has reversed the judgment below, saying: "The punishment of an attempt is based upon this, that it manifests the intention to commit an offence, in a manner endangering the order of law. Such danger, as is generally recognized in the Austrian decisions and doctrine, can only be denied where the attempt is made with means completely and unqualifiedly (*in abstracto*) unfit to attain the object. If the cause of failure was only in the manner of execution, or in the concrete quality or operation of the object used (so in fraud of him whose deceit was planned), then a punishable attempt is to be assumed. The acquittal was erroneous. A forged instrument is adapted to deceive."

HORÆ SUBSECIVÆ.

The *Canada Law Journal* thinks "there is no reason why editors of legal journals should not have some vacation as well as their brethren." It is proposed, therefore, to publish the journal named during vacation only "as circumstances may require." It is a mistake to imagine that editors need holidays. It is fun and play with them all the year round. However, out of consideration for their readers, it may be desirable that publication should be suspended sometimes for a while.

AMERICAN BAR ASSOCIATION.

The fourth annual meeting of the American Bar Association will be held at Saratoga Springs, on Wednesday, Thursday and Friday, August 17th, 18th and 19th, 1881. The sessions will be held at 10 o'clock a.m. and 7 o'clock p.m. on Wednesday and Thursday, and at 10 o'clock a.m. on Friday, at Putnam's Music Hall, corner of Broadway and Phila street, opposite the United States Hotel. On Wednesday the address of President, Edward J. Phelps, of Vermont, will be delivered at the opening of the session. Papers will be read by Thomas M. Cooley, of Michigan, on "The Recording Laws of this Country;" U. M. Rose, of Arkansas, on "The Progress of Codification;" Leonard A.

Jones, of Massachusetts, on "Legislative Control of Railroads." On Thursday the morning session will be opened by the annual address, by Clarkson N. Porter, of New York, to be followed by the reports of the standing committees, reports of special committees, nomination and election of officers. On Friday, unfinished business, new business, general debate. If the other business of the session will permit, a short paper on "The advantages of a National Bankrupt Law" will be read by Samuel Wagner, of Philadelphia.

THE LATE LORD BEACONSFIELD.

It is stated, on the authority of Mr. Ralph Disraeli, that the late Lord Beaconsfield, after serving for a certain time as articled clerk in the Old Jewry, entered as a student of Lincoln's Inn and kept several terms, although he was not called to the bar. "J. C. B." states that Lord Beaconsfield became nominally a pupil of his cousin, the late eminent conveyancer, Mr. Nathaniel Basevi, "who told me, some years afterwards, that 'Ben Disraeli' showed no liking for law, and generally occupied himself at chambers with a book, brought somewhat late in the day by himself. The work I remember as having been particularised was Spencer's 'Faerie Queen', bound in green morocco."

Mr. George H. Parkinson, of the central office, Royal Courts of Justice, has published the following extract from his diary of 1852, when he was clerk to Baron Parke:—"Saturday, June 12, 1852. Mr. Disraeli, the new chancellor of the Exchequer, came down about two, to be sworn in. He was quite alone; and Davis, the usher, showed him into the judges' private room, where I happened to be arranging some papers. I placed him in a chair, and said I would go and tell the judges he had arrived. In a few minutes they came in—Lord Chief Baron Pollock, Barons Parke, Alderson, Rolfe and Platt. All seemed to know him, and all talked and laughed together. His new black silk robe, heavily embroidered with gold bullion fringe and lace, was lying across a chair. 'Here, get on your gown,' said Baron Alderson; you'll find it monstrously heavy.' 'Oh, I find it uncommonly light,' said the new chancellor. 'Well, it's heavy with what makes other things light,' said the Lord Chief Baron. 'Now, what am I to say and do in this performance?' was the next question.

'Why, you'll first be sworn in by Vincent, and then you'll sit down again; and if you look to the extreme left of the first row of counsel you will see a rather tall man looking at you. That is Mr. Willes out of court, but Mr. Tubman in court; and you must say, 'Mr. Tubman, have you anything to move?' He will make his motion, and when he sits down you must say, 'Take a rule, Mr. Tubman,' and that will be the end of the affair.'

"The ushers were summoned, and all marched to the Bench—Baron Platt as junior Baron first, Mr. Disraeli last, immediately preceded by the Lord Chief Baron. Mr. Vincent, the Queen's Remembrancer, administered the ancient oath in Norman French, I think. Mr. Tubman (afterwards Mr. Justice Willes) made some fictitious motion, was duly desired to 'take a rule,' and the chancellor and barons returned to the private room. 'Well, I must say you fellows have easy work to do, if this is a specimen,' said Mr. Disraeli. 'Now, don't you think that, or you'll be cutting down our salaries,' replied one of the judges. 'Take care of that robe,' said Baron Alderson; you can leave it to your son when the Queen makes him a chancellor.' Oh, no; you've settled that business,' said the new chancellor; 'you'd decide that was fettering the Royal Prerogative.' There was a general roar at this witty allusion to a very important case just decided in the House of Lords, in which the Peers had held that a large monetary bequest by the late Earl of Bridgewater to his son, on condition that he should obtain the title of Duke within a certain time, was void, on the ground that it was a fettering of the Royal prerogative."

TAKING CASES ON SPECULATION.

The *Albany Law Journal* and Judge Countryman have been carrying on an ethical controversy, more curious than edifying, we fear, to the laity, on the subject of taking cases on "speculation." The judge says that the practice is perfectly right, and even praiseworthy; that poor suitors, if they could make no arrangements to retain counsel out of the proceeds of the suit, would often find themselves unable to prosecute their rights, and that such arrangements are sanctioned by the courts. The *Law Journal*, on the other hand, strongly reprobates this view; insists that though the courts may tolerate the

practice, that does not settle the matter, since many things are tolerated in courts—such as the use of decoys and informers, pleas of infancy, usury, etc.,—which no one thinks are in themselves fine or laudable. But at the same time, it admits that cases must occasionally be taken on “speculation,” and states the difference between the judge and itself to be that “we would take just as few cases of this kind as possible, he would get just as many of them as he could.”

If this could be taken as a fair statement of the position of the two disputants, we should say that the *Law Journal* was undoubtedly right.

The strong feeling which still exists among conservative members of the bar on the subject grows out of the dangerous tendency of the practice, and this is not affected by the fact that now and then it may be for the interest of litigants to resort to it. In new countries, and in countries where the bar has long ceased to be a close corporation, and law is carried on like any other business, the inherited tradition with regard to taking cases on “speculation” is pretty sure to be supplanted in a measure by the feeling that such a practice is often for the mutual advantage of lawyer and client. The story of the eminent western lawyer, who, on being asked to what branches of the profession he had chiefly devoted himself, replied, “Champerty and Maintenance,” illustrates a condition of professional sentiment which it would still hardly be possible to imagine existing in New York, but toward which some years ago the bar seemed to be making rapid progress. Until very recently, will-contests on a speculative basis were positively encouraged by a statute (now, we believe, repealed) permitting large allowances out of the estate to the unsuccessful party's counsel, and it was out of the practice founded upon this that the unscrupulous rapacity and ferocity that used to distinguish such contests in this city chiefly grew. The evil tendency of speculative lawsuits is reason enough for discouraging the practice wherever it can be done; but the question of how far it can be done is very like that other question of legal ethics which every few years or so comes up for discussion—how far a lawyer may go in defending a client.

Many moralists, from the time of Dr. Johnson down, have undertaken to settle this, but with so little success that Lord Brougham's suggestion, that when a lawyer undertakes his client's

case his duty is to throw overboard all moral principles, is still regarded in many quarters as being the prevailing professional view of the subject. The question is one of those which cannot be decided one way or the other abstractly. It is necessary to know the facts in each particular case before deciding whether a breach of professional ethics has been committed; but it is certainly safe to agree with the *Law Journal* that any one who tries to get as many “speculative” cases as he can will not earn the approval of the conservative part of the bar.—*N. Y. Nation*.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, August 2, 1881.

[In Chambers.]

Before RAMSAY, J.

Ex parte CLARA LEFEVRE, and Ex parte EXILDA DUFRESNE, Petitioners for writ of Habeas Corpus.

Summary conviction—32-33 Vict. c. 32, s. 17—*Sentence*.

In any case tried under 32-33 Vict. c. 32, s. 2, ss. 3, 4, 5 or 6, if the prisoner be condemned to both fine and imprisonment, hard labor cannot be added to the sentence of imprisonment.

RAMSAY, J. The applicant was convicted before the Recorder under the provisions of the 32 & 33 Victoria, cap. 32, sect. 17, and condemned to a fine of \$100 and to be imprisoned at hard labor for the space of six months. The objection taken is that the Recorder has exceeded his jurisdiction in condemning the prisoner to hard labor, inasmuch as he could only add the penalty of imprisonment, that is imprisonment without hard labor, to the fine.

The question is not a new one. About six years ago it was raised before me in the case of *May Somers*, convicted under the same section. I held the objection good and quashed the conviction. Unless some strong argument could be adduced against the conclusion I then arrived at, I should feel myself bound by that decision. To waver, and change rulings in criminal cases, gives rise to feelings of insecurity, I might almost say of injustice, for it creates inequality where specially there should be none, and naturally brings the administration of the law into contempt. But far from any conclusive argu-

ment having been brought forward, to lead me to think I was wrong, it seems to me that the question is one of elementary simplicity. The statute permits three kinds of punishment:

- (1) Imprisonment not exceeding 6 months with or without hard labor.
- (2) Fine not exceeding, with the costs, \$100.
- (3) Fine and imprisonment not exceeding the said period and term.

It is contended for the conviction that the third form of penalty allows fine and imprisonment *with hard labor*. To arrive at such a conclusion we must ignore not only the common use of a technical term, but the plain meaning of a word. Imprisonment evidently does not of itself include hard labor, which is an aggravation of the penalty, just as solitary confinement, bread and water, or whipping. Again, imprisonment, in the language of the common law, has never been held to permit of any addition. Fine and imprisonment are the common law punishments for all misdemeanors, and without the authority of a statute no other punishment has ever been added.

My attention has been drawn to the case of Gustave Charel, decided last January by Mr. Justice Monk. With all due deference to the opinion of my learned brother, delivered after my decision in the case of Somers, I cannot give up my already expressed opinion. It is not because I doubt that it is the duty of the judge to seek the intention of the legislature in interpreting penal legislation as in the interpretation of a civil statute. That is the common doctrine, and Mr. Hardcastle in his "Construction and effect of Statutory Law," really says nothing more. But here it is not a question of interpretation at all. The Recorder out of whole cloth has added a new punishment, perfectly distinct from the others he is authorized to inflict by the law. I think I may venture to say that there is no authority for this. It is a precedent of the most dangerous character and gives opening to the most serious abuses.

I would add one other remark. The decision in May Somers case took place in 1875, it was a decision of the Court of Queen's Bench, Crown side, rendered therefore in open court, and fully reported, yet up to this time Parliament has not thought fit to declare that its intention had been misconstrued. On the Vagrant Act a similar question arose, and Parliament passed a

law last session authorizing the punishment of imprisonment in all cases under that act to be either with or without hard labour.

There is another case, on the application of Exilda Dufresne, in which the same point is raised, and some others. I have not thought it necessary to adjudicate on the other points as I think the prisoner must be discharged for the same reason as Clara Lefevre.

St. Pierre & Scallon, for petitioner Lefevre.

O. Augé, for petitioner Dufresne.

J. A. Ouimet, Q.C., for the Crown.

COURT OF QUEEN'S BENCH.

MONTREAL, February 15, 1881.

DORION, C. J., MONK, RAMSAY, CROSS, BABY, JJ.
THE NORTHERN ASSURANCE Co. (defts. below),
Appellants, and PREVOST (plff. below), Res-
pondent.

*Fire Insurance — Representation — Warranty —
Waiver.*

Words in a policy represented that the house insured was "à être lambrissée en brique." Held, that this did not constitute a warranty of a promissory nature that the house was to be immediately covered with brick, but merely expressed the intention of the insured to brick the building when circumstances would permit.

Furthermore, the Company, having accepted a renewal premium while the premises were, to their knowledge, in the same state, could not take advantage of the words cited.

The appeal was from a judgment of the Superior Court, Montreal, Sicotte, J., condemning the appellants to pay the sum of \$800 for loss under a fire policy.

The premises insured were by the terms of the policy "*à être lambrissée en brique*," and the only question of law was whether the insured was under a warranty to have the house encased in brick within a reasonable delay.

It appeared that the year for which the house was originally insured had expired, and the Company had accepted a renewal premium while the premises were in the same condition.

The following opinion was by

RAMSAY, J. This is an action on a fire insurance policy for \$1,200. By the action \$1,000 was claimed, and by the judgment \$800 was allowed to plaintiff. Defendant resisted the

action on two grounds : First, it was contended that the house, which was of wood, was to be covered with brick, and that it had not been so covered before the fire although there had been sufficient time to cover it, that this was a warranty, and consequently that there was no insurance.

There can be no sort of objection to calling this a warranty ; but it was not a warranty of an existing thing, or a thing on which the insurance depended, and consequently by whatever name it may be called, the failure to execute it could not vitiate the policy. That this is now put forth as an excuse for not paying for the loss is evident from the fact that the insurance was effected on the 17th March, 1877, and renewed on the 17th March, 1878, on the house still "*à être lambrissée en brique*." If, as Mr. Taylor says, it ought to have been completed in May, 1877, why did he renew the policy in May, 1878 ?

In the second place, it is contended that the house was over-estimated. The evidence principally relied on is the valuation of the municipality. The three valuers are brought up by plaintiff, and they all swear positively that their valuation is relative and not a real valuation of the property. There is then an attempt to prove that the plaintiff would have sold for \$1,100. The witness says he hoped he could get the property for this rate ; but he was disappointed in this expectation. This is not the sort of evidence to support an accusation of fraudulent over-valuation. Something more precise is required.

There is also an attempt to prove that the house was set fire to—I presume by the insured. This is not alleged, and evidence as to this ought not to have been admitted. It is, however, quite harmless, for nothing of the sort is proved.

I would confirm.

Judgment confirmed.

Trenholme & Maclaren for Appellants.

I. A. Jodoin for Respondent.

A. Lacoste, Q.C., Counsel.

SUPERIOR COURT.

MONTREAL, June 27, 1881.

Before MACKAY, J.

SMART, petitioner, and THE CORPORATION OF THE VILLAGE OF HOCHELAGA, Respondent.

Mandamus—License to sell liquor—Discretion of Council to refuse certificate.

The Superior Court has no authority to issue a mandamus to a Municipal Council to compel the Council to grant a license to sell liquor, to a person who presents a certificate signed by twenty-five municipal electors, under 43-44 Vict., ch. 11, sec. 5.

PER CURIAM. This is a petition for a writ of mandamus, to compel the Corporation of the village of Hochelaga to accede to the wish of Mr. Smart for a confirmation of his certificate, and for a license to sell liquor. The petitioner alleges that he has furnished the requisite certificate signed by 25 electors resident within the limits of the municipality ; that he had a license up to May, 1881, and that the Council refuses now to confirm his certificate and renew his license, without cause.

I have looked to see whether the law has been changed since the case of *Privett v. Sexton** was decided in 1874. It was there held that the then License Commissioners at Montreal were not bound, under 37 Vic., c. 3, to confirm the certificate of 25 electors towards a license for keeping a tavern, but had a discretion to refuse to confirm, and the application for a mandamus was in that case rejected.

The law does not seem to be changed in this respect, and I am of opinion that the Council has a discretion to refuse to confirm the certificate if it "sees fit." The petition is, therefore, rejected with costs.

The following order was made :—

"Having heard the parties by their counsel upon the petition of the *requérant* made and filed on the 17th of June instant, praying that a writ of mandamus do issue in the present case, ordering the respondent to confirm the certificate required by law previous to the obtaining his license for keeping a tavern, or *maison d'entretien public*, within the limits of the Corporation of the said village of Hochelaga ; having examined the proceedings and deliberated ;

"I, the undersigned Judge, considering the petition unfounded, and that the *Conseil* might refuse, as it has "seen fit" to refuse, to confirm the certificate referred to in the petition of Smart, do reject the said petition with costs," &c.

O. Augé, for petitioner.

Préfontaine & Major, for respondent.

* 18 L. C. Jurist, 192.

SUPERIOR COURT.

MONTREAL, June 27, 1881.

Before MACKAY, J.

LEROUX et al. v. DESLAURIERS, NORMAN, opposant,
and DUMOUCHEL, *mis en cause*, petitioner.

Alimentary allowance—Contempt.

A person committed for contempt is not entitled to an alimentary allowance, under C.C.P. 790.

The petitioner was a bailiff of the Superior Court who was in gaol for contempt in selling seized goods, in spite of oppositions filed to the seizure and an order from the prothonotary to suspend proceedings. (See *ante*, pp. 173-175, where the case is reported at length). He now asked for an alimentary allowance, under C.C.P. 790, supporting the application by an affidavit that he is not worth \$50.

MACKAY, J. The opposant, Norman, has answered in law, that this is not a case in which an alimentary allowance can be asked for. I find that Judges Torrance and Jetté have so ruled here, and also Judge Stuart at Quebec. The application is, therefore, rejected.*

The following order was added to the judgment dismissing the petition:—

"And seeing the affidavit of Dumouchel at the end of his petition, from which affidavit it appears that he is unfit to be continued a bailiff of the Superior Court, he is dismissed."

A. Mathieu, for petitioner.

Dejardins & Lanctot, for Norman.

*See *Cramp v. Cocquereau*, 2 Legal News, p. 332; *Vermette v. Fontaine*, 6 Q.L.R., 159.

GENERAL NOTES.

The Assize Court at Heibron, in Wurtemberg, had lately before it a case which is probably unique in criminal annals. A laborer who was laid up with a broken leg was charged with embezzlement, and was summoned to appear before the *juge d'instruction*. Overwhelmed with the disgrace, perhaps unable to exculpate himself, he ordered his son to hang him. The son, who also was a laborer, obeyed his father's wish, and carried him to the house loft, where he hanged him effectively from one of the beams. The court sentenced the prisoner to imprisonment for three years and nine months.

Vacation is at hand, and the lawyers "should not make things unnecessarily long," as the English judge told the lawyer who talked about *nolle prosequi*, with the accent on the second syllable. In *Gaines v. Lisardi*, 3 Woods, 77, counsel "argued seventeen

days." Judges also need a word of caution on this point. The *Southern Law Review* for June-July, in a notice of 102 U. S. Reports, says:—"After perusing twenty-six solid pages of a concurring opinion by Justice Clifford, in *Railroad Company v. National Bank* (Justice Harlan, at the close of eleven pages of the opinion of the court, had added, 'Further elaboration would seem unnecessary'), and the ten pages of opinion by him in *Parks v. Booth*, which constitute his contribution to this volume, a half-guilty sense of satisfaction steals over the reader as he appreciates that these are the last of those famously elaborate disquisitions by which that learned judge has so often, during more than twenty-two years, exhausted at once the law of the case and the strength and patience of the readers."

CIRCUMSTANTIAL EVIDENCE.—A lawyer in Central New York gives the following account of one of his first cases: "My client sued a neighbor for the alleged killing of a favorite dog. The proof consisted in the mysterious disappearance of the animal, and the possession of a dog's skin by the defendant, which, after considerable argument, was brought into court in evidence. It was marked in a singular manner, and was positively identified, with many tears, by the plaintiff's wife and daughter as the undoubted integument of the deceased Bose. In summing up to the jury, I was in the midst of a highly colored picture of the virtues of the deceased, and the love of the children for their four-footed friend, when I was interrupted by a slight disturbance in the crowd near the door of the little school-house which served as court-house. Looking around, I saw my client's youngest son, a tow-headed urchin of twelve, coming forward with a dog whose skin was the exact counterpart of the one put in evidence. The dog wagged his tail with good-natured composure, and the boy cried in his childish treble, 'Paw, Bose has come home.' I gathered up my law-books and retreated, and I have never had perfect confidence in circumstantial evidence since."

A singular case on the "measure of prudence," is *Bloomington v. Perdue*, Illinois Supreme Court, 1st June, 1881, 13 Cent. L. J. 39. It was there held in an action by a young lady against a city, to recover damages for an injury to the uterus, caused by a fall on a defective sidewalk, that on the question of the plaintiff's freedom from negligence, instructions which do not refer as a standard of caution to "what ordinary young ladies would do," but to the conduct of "an ordinarily prudent person," and of "a woman of common or ordinary prudence," are not faulty in respect to the standard referred to. The defendant proved that the plaintiff did not take proper care of herself after the injury, by remaining quiet, as showing negligence on her part, increasing the injury. On cross-examination of the physicians called by the defence, the plaintiff proved, over defendant's objection, that an unmarried woman, not informed of the anatomy of the womb, could not be expected to act as promptly and intelligently as one understanding it, or as a medical man would; and that it was a common thing for women to suffer from a displacement or injury of the organ spoken of, without themselves knowing the trouble. *Held*, that there was no error in allowing the evidence.—*Albany L. J.*

The Legal News.

VOL. IV. AUGUST 13, 1881. No. 33.

CONFESSIONS TO PRIESTS.

In the course of a judgment recently delivered by the Master of the Rolls, in the case of *Wheeler v. Marchant*, his Honor stated that communications made to a priest in confession were not protected. On this question the English *Law Times* has an interesting note, which we subjoin :

"It is, no doubt, true that most text book writers lay it down that a priest or clergyman is bound, if required in a court of justice, to give in evidence confessions or statements made to him under the seal of confession or otherwise in his clerical capacity. And this view has also the support of several dicta of eminent judges. But, if we examine carefully the authorities on the subject, we shall see that really the question cannot be considered as decided.

"There can be little or no doubt that before the Reformation confessions were held sacred and inviolable by the common law of England, both civil and ecclesiastical, and that no court of justice compelled the confessor to reveal communications made to him by the penitent : Phillimore Eccl. Law, 700. It would seem from Lyndwood that there were exceptions from this rule, as when statements were made by the penitent which ought not properly to have formed part of his confession. Possibly cases of high treason may also have been excepted. The laws of Henry I. (*Leges Hen. I. c. 5, s. 17*), forbid the priest to reveal sins told him in confession, and punish him with degradation and a pilgrimage with ignominy. Also the 9th of the Constitutions of Archbishop Reynolds (A.D. 1322), forbids a priest, even through fear of death, to discover any confession, and if he offends, orders him to be punished by degradation without hope of reconciliation : Johnson, ii. 342. As this Constitution is contained in and glossed by Lyndwood, (*Oxford edit. p. 334*), it must be considered part of the canon law of England. And this, except when contrary to the statute law, common law, or royal prerogative, has statutory recognition by one of the most important of the Reformation statutes : 25

Henry VIII. c. 19. By the 113th Canon of 1603, which was passed by Convocation with the consent of the Crown, a clergyman is forbidden to reveal anything learnt by him in confession, except to save his own life. And by the rubric in the service for the visitation of the sick, "the sick person shall be moved to make a special confession of his sins, if he feels his conscience troubled with any weighty matter." Now by the Act of Uniformity this rubric has the authority of an Act of Parliament ; so that, if the clergyman is bound to give in evidence, facts thus obtained, the rubric would constitute a mere trap. Several of the modern cases, which are usually quoted to show that confessions are not privileged, are shown by Mr. Best, in his work on Evidence, to be inapplicable : Best 690. However, in *R. v. Sparkes*, cited in 1 Peake, 77, Mr. Justice Buller held (on circuit) that confession to a Protestant clergyman was not privileged. And in *Butler v. Moore*, Macnally's Evid. 253, the Irish Master of the Rolls gave a similar decision with respect to a Roman Catholic priest. *Wilson v. Rastall*, 4 T. B. 753, is a dictum to the like effect. On the other hand, in *Du Barre v. Livette*, 1 Peake, 77, Lord Kenyon said, when *R. v. Sparks (ubi sup.)* was cited : "I should have paused before I admitted the evidence there admitted." In *Broad v. Pitt*, 3 C. & P. 518, Chief Justice Best said he should not compel a clergyman to disclose in evidence communications made by a prisoner, but should receive them if the clergyman chose to disclose them. Of course, in the case of privileged communication, the privilege is that of the person making the communication, not of the adviser.

"In *R. v. Griffin*, 6 Cox Cr. Cas. 619, Baron Alderson expressed his opinion that evidence consisting of conversations between the accused and her spiritual adviser, the chaplain of a work house, should not be given in evidence.

"We believe that in some, at least, of the American States, confessions made to a minister of any denomination are privileged. In the result, while we must guard ourselves from being supposed to give an opinion that confessions are privileged, we would say that the question is not so settled as to entitle the Master of the Rolls to lay it down as positive law that they are not. Mr. Justice Stephen's opinion is that clergy probably can be compelled to give

confessions in evidence, but says, correctly, that it has never been solemnly decided: Steph. Evid. Art. 117 and Note xlv."

THE TEMPORALITIES FUND CASE.

The case noted at 3 Legal News, p. 250, *Dobie v. Board for the Management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland*, has been argued before the Judicial Committee of the Privy Council, in pursuance of leave to appeal obtained, (3 Legal News, p. 308.) The hearing occupied three days, and judgment has been reserved. There were present Lord Blackburn, Lord Watson, Sir Barnes Peacock, Sir Montague Smith, Sir Robert Collier, Sir Richard Couch, and Sir Arthur Hobbouse. From the *Times* of the 16th July we take the following summary:—

This was an appeal from a judgment of the Court of Queen's Bench for the Province of Quebec (Appeal Side) of the 19th of June, 1880, affirming a judgment of the Superior Court of Lower Canada.

Mr. Horace Davey, Q.C., Mr. McLeod Fullarton, and Mr. Donald Macmaster (of the Canadian Bar) were counsel for the appellant; Mr. Benjamin, Q.C., Mr. Jeune, and Mr. J. L. Morris (of the Canadian Bar) for the respondents.

This was admittedly a very important case, in which the appellant, the Rev. Robert Dobie, by means of a writ of injunction, contested the right of the respondents to the management of a large amount of property. It also involved intricate questions arising out of the distribution under the British North America Act, 1867, of the legislative powers attributed to the Canadian Parliament, and to the local or provincial Legislatures respectively. The facts, as briefly stated by Mr. Justice Ramsay, were these:—Prior to 1875, there existed a religious body known as the Presbyterian Church of Canada in connection with the Church of Scotland. It did not owe its existence to any charter or statute, but it grew out of the settlement in Canada of Presbyterians in communion with the Church of Scotland. But if no statute defined precisely the limits, rights and privileges of this body, numerous statutes acknowledged its existence, and the right of its clergy to share in the lands, known as the "Clergy Reserves," was admitted. When, by process of legislation, the

share of the clergy of the Church of Scotland in Canada became fixed, an Act of the Legislature of United Canada was obtained (22 Vict., chap. 66) to make provision for the management and holding of certain funds of the Presbyterian Church in connection with the Church of Scotland, "now held in trust by certain commissioners, hereinafter named, and for the benefit hereof, and also of such other funds as may from time to time be granted, given, bequeathed, or contributed thereto." The body so incorporated was the Board of Management, the present respondents. This Act being still in force, in 1874 numerous clergymen and others, members of different Presbyterian Churches in Canada, deemed it desirable to unite their ecclesiastical fortunes and henceforward to form one body, to be called "The Presbyterian Church in Canada." Application was made almost simultaneously to the Legislatures of Ontario and Quebec for authority to give effect to this determination, and to enable the new body to deal with the property of the churches so united. An Act of the Ontario Legislature (38 Vic., ch. 75) was passed, the preamble of which set up that:—

"Whereas the Canada Presbyterian Church, the Presbyterian Church of Canada in connection with the Church of Scotland, the Church of the Maritime Provinces in connection with the Church of Scotland, and the Presbyterian Church of the Lower Provinces, have severally agreed to unite together and form one body or denomination of Christians, under the name of 'the Presbyterian Church in Canada,' and the Moderators of the General Assembly of the Canada Presbyterian Church, and of the Synods of the Presbyterian Church of Canada in connection with the Church of Scotland, and the Church of the Maritime Provinces in connection with the Church of Scotland, and the Presbyterian Church of the Lower Provinces, respectively, by and with the consent of the said General Assembly and Synods, have by their petitions, stating such agreement to unite as aforesaid, prayed that for the furtherance of this their purpose, and to remove any obstructions to such union which may arise out of the present form and designation of the several Trusts or Acts of incorporation by which the property of the said churches, and of the colleges and congregations connected with the said churches,

or any of them respectively, are held and administered or otherwise, certain legislative provisions may be made in reference to the property of the said churches, colleges and congregations, situate within the Province of Ontario, and other matters affecting the same in view of the said Union."

The first section then vested all the property of the different churches so united in the united body under the name of the "Presbyterian Church in Canada." Then came reservations and modifications of certain rights, and then by section 4 certain legislation in Ontario respecting the property of religious institutions was made applicable to the various congregations in Ontario in communion with the Presbyterian Church in Canada. Section 5 declared that all the property, real and personal, belonging to or held in trust for the use of any college, educational or other institution, or for any trust in connection with any of the said churches or religious bodies, either generally or for any special purpose, or object, shall, from the time the said contemplated union takes place, and thenceforth belong to and be held in trust for and to the use in like manner of "The Presbyterian Church in Canada." Section 7 then dealt specially with Knox College and Queen's College in Ontario, and with "The Presbyterian College" and with "Morrin College" in the Province of Quebec. Section 8 dealt with the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland, "administered by a Board incorporated by statute of the heretofore Province of Canada." Section 9 dealt with the Widows and Orphans Fund of "The Canada Presbyterian Church," and "The Presbyterian Church of Canada in connection with the Church of Scotland." Section 10 authorized the new body to take gifts, devises and bequests; and lastly, section 11 declared that "the union of the said Churches shall be held to take place so soon as the articles of the said union shall have been signed by the moderators of the said respective Churches." The legislation of the Province of Quebec took the form of two Acts, 38 Vict., chap. 62 and 64, the former respecting the union of certain Presbyterian Churches; the latter is styled "An Act to amend the Act intituled, 'An Act to incorporate the Board of Management of the Temporalities Fund of the

Presbyterian Church of Canada in connection with the Church of Scotland.'" Chap. 62 of the 38 Vict., Quebec, with the exception of the section relating to the Temporalities Fund, was substantially the same as the Ontario Act, 38 Vict., Chap. 74, but there were a few points of difference. The Ontario Act bestowed all the above-mentioned privileges on "the Presbyterian Church in Canada," while the Act of Quebec bestowed them on the body so named "or any other name the said Church may adopt." The Quebec Act also declared that the union of the four Churches was to take place from the publication of a notice in the *Gazette* to the effect that the articles of union had been signed by the moderators of the respective Churches. The Act transferred almost the whole of the Temporalities Fund over to the new Church, and confided its management to a Board constituted in a manner entirely different from the Board under the old Act. The condition of union in Ontario was accomplished, and the notice appeared in the Quebec *Gazette*. The appellant, Mr. Dobie, a minister of the Presbyterian Church in Canada in connection with the Church of Scotland, refused, with others, to concur in that fusion, and he petitioned for an injunction to prohibit the Board, as now constituted, to deal with the Temporalities Fund. The Court dissolved the injunction, and its judgment was upheld on appeal by a majority of the judges of the Court of Queen's Bench for Quebec. Hence the present proceedings.

For the appellants it was contended that the statutes 38 Vic., c. 62 and 64 (Quebec) and 38 Vic., c. 75 (Ontario), were, in respect of the provisions material to the case *ultra vires* and illegal, and that the Act 22 Vic. c. 68 (Canada), was in force and binding on the respondents. The Board was at present illegally constituted and the individual respondents had no right to act as members of it. "The Presbyterian Church in Canada" was not identical with "the Presbyterian Church of Canada in connection with the Church of Scotland," and was not entitled to its rights, property, and status, nor was its General Assembly identical with the Synod of the latter church. The ministers, members and congregations, who refused to join in the act of union, and were now organized under the name of "the Presbyterian Church of

Canada in connection with the Church of Scotland," were identical with the Church of that name before the union, and were not entitled to its rights, property, and status.

For the respondents, it was argued that the Acts in question were within the scope of the legislative authority conferred upon the Legislature of the Provinces by the Confederation Act, 1867, and were valid and binding. "The Presbyterian Church of Canada in connection with the Church of Scotland" continued its identity after its union with the other Presbyterian bodies, and the appellant (Mr. Dobie) having seceded, and thus ceased to be a minister, had forfeited all claim to the fund in question. The rights of persons entitled to beneficial interests in the fund were unaffected either by the union of the various bodies or the legislation impugned by the appellant.

Their Lordships, at the close of the arguments, which had lasted three days, took time to consider their report to Her Majesty in the matter. Judgment was therefore reserved.

**MUNICIPAL CORPORATION—LIABILITY
OF, FOR INJURY FROM DEFECTIVE SEWER.**

ENGLISH HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION,
APRIL 13, 1881.

FLEMING V. MAYOR AND CORPORATION OF MANCHESTER, 44 L. T. Rep. (N.S.) 517.

A municipal corporation having authority to build, repair and clean sewers is liable for injury to private property arising from a defect in a sewer constructed by it, where such defect might be discovered by the use of reasonable means, and the corporation has neglected to use such means.

Motion for judgment. This action was tried before Stephen, J., at Manchester, at the last assizes in January, 1881. The following are the facts of the case :

The plaintiff was the owner of a house in Manchester, and the defendants are the corporation of Manchester. During a violent storm of rain, thunder, and lightning a sewer burst under a cellar which communicated with the lower rooms of the plaintiff's house. The rooms were

flooded and the outer wall blown out into the river Irwell, which flowed past the walls of the house. The fall of the wall brought down the whole of the house, which fell into the river.

The action was brought against the corporation for damages, which were agreed upon between the parties in the course of the trial.

At the trial the principal question of fact put before the jury was whether the bursting of the sewer was caused by a flash of lightning or by the force of the water, and the jury found that it was caused by the water, and not by the lightning.

At the request of the learned counsel the learned judge put to the jury the following questions, and received the following answers : 1. Was the destruction of the house caused by the bursting of the sewer ? Yes. 2. Was the bursting of the sewer caused by defects in the original construction of the sewer ? Yes. 3. Was the bursting of the sewer caused by the omission of the defendants to take reasonable means to discover it ? Yes. 4. Was the ignorance of the corporation as to the existence of any defect in the sewer due to any omission on their part to take reasonable means to discover it ? Yes. 5. Was the bursting of the sewer caused by the lightning ? No ; i.e., would it have happened if there had been no lightning ? Yes.

Upon these findings the learned judge left the parties to move for judgment, and they did so accordingly on the 26th March, 1881, when the case was fully argued.

By 11 Geo. IV, chap. xlvii, § 58, power was given to the Manchester Improvement Commissioners to make main sewers, etc., and to use, widen and enlarge private sewers for the purpose of communication, and also to continue sewers through inclosed lands.

By 6 Vict., chap. xvii, § 3, the powers of commissioners were transferred to the corporation of Manchester. By section 4 the powers of the corporation are to be executed by the town council ; and by section 5 the property of the commissioners were vested in the corporation.

By 14 and 15 Vict., chap. cxix, § 36, it was enacted : " That it shall be lawful for the council from time to time, and at all times hereafter, to cause such and so many common sewers and drains as they may think sufficient and necessary to be constructed in, along, or across any of the streets within the borough, and also to

cause any of the common sewers or drains which now are or hereafter shall be within the borough to be enlarged, repaired or cleansed when and so often as they shall deem proper; and in case it shall be found necessary, for making or completing any such common sewers or drains, it shall be lawful for the council to carry the same into or through any inclosed lands or grounds lying within the borough, and also to make use of any private sewers or drains for the purpose of forming a communication between any public sewer, drains or water-courses, and in case any such private sewer or drain shall not be sufficient for the purposes aforesaid, to widen and enlarge the same."

C. Russell, Q. C. (with him *Leresche*), for the plaintiff.

Sir *John Holker*, Q. C., and *Heywood*, for the defendants.

STEPHEN, J., stating the facts of the case as given above, continued: It will be convenient in the first place to state the position of the corporation in relation to the sewers. In 1830 an act (11 Geo. IV, chap. xlvii) was passed by which it was enacted that it should be lawful for the Manchester Improvement Commissioners to cause such sewers as they should think necessary, to be made, and when made, to be repaired and cleansed. In 1843 the powers of the commissioners were transferred to the corporation, and the property of the commission was vested in the corporation, and it was provided that the powers of the commissioners should be exercised by the town council. In 1851 it was enacted that it should be lawful for the council from time to time to cause as many sewers and drains as they might think necessary, to be constructed, and also cause any sewers within the borough to be repaired, enlarged or cleansed as often as they thought it necessary. The drain which burst was constructed by the commissioners forty years before the accident, and I understand the findings of the jury to amount to this, that if the sewer had been originally properly constructed it would have required no repair, and would not have burst, and that if the corporation, the sewer being what it was, had taken reasonable means to inform themselves of its condition and had executed proper repairs, it would not have burst. Upon this state of facts it was contended for the plaintiff that though the

corporation were not within the rule stated in *Fletcher v. Rylands*, L. R., 3 H. L. 380, according to which a person is bound to protect others against a danger which he has caused for his own purposes upon his own land, they were nevertheless under a legal duty of a narrower kind, viz., a duty to take reasonable means to inform themselves of the state of the sewer, and to use the powers conferred upon them by statute for the purpose of preventing injuries which a defective condition of the sewer might cause. It was contended that the omission to do this constituted negligence, for the effects of which they were answerable in damages. On the other hand it was argued for the defendants that the corporation were under no legal duty to inform themselves as to the state of the sewer, but that their duty was only to execute repairs upon having notice that such repairs were required. A great number of cases were cited in the course of the argument before me; but it appears to me that the principles on which this case ought to be decided are established by the comparatively small number of decisions to which I am about to refer. It was decided in the case of *Parnaby v. Lancaster Canal Company*, 11 Ad. & El. 223, and see especially pp. 242, 243, that when a company constituted under a private act of Parliament constructed a canal for their profit and opened it to the public on the payment of tolls, the common law imposed upon the proprietors a duty to take reasonable care, as long as they kept the canal open for the public use of all who might choose to navigate it, that they might navigate it without danger to their lives and property. The decision of the Court of Queen's Bench suggests (see p. 230), though it does not exactly state, that if the company has statutory powers for the purposes referred to, it is their duty to use them. The cases of *Mersey Docks Trustees v. Gibbs* and *Mersey Docks Trustees v. Penhallow*, L. R., 1 H. L. 93, carry the doctrine somewhat further. The opinion of the judges delivered in the House of Lords in that case by Lord Blackburn examines all the decisions at length, and one of the results arrived at in the House of Lords (which adopted to the full the opinion delivered by Lord Blackburn) was that the fact that the trustees in whom the docks were vested did not collect tolls for their own profit, but merely as trustees

for the benefit of the public, made no difference in respect of their liability. Lord Blackburn states in one part of the opinion referred to (at p. 110), that the proper rule and construction of such statutes (namely statutes constituting bodies of trustees, etc., for public purposes) is that in the absence of something to show a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same thing. Two cases, which complete and supplement each other, seem to me to show distinctly that these duties, in the case of such a body as the corporation of Manchester, include the use of every power conferred upon them by law for the purpose of protecting all persons affected by their operations from being injured by them. These cases are *Cracknell v. Corporation of Thetford*, L. R., 4 C. P. 629, decided in 1869, and *Geddis v. Proprietors of Bann Reservoir*, L. R., 3 App. Cas. 430, decided in 1878. In the first of these cases the corporation of Thetford erected certain staunches in the river Brandon which caused an accumulation of silt and the growth of river weeds, whereby the plaintiff's land was flooded. It was held that the defendants were not liable because they were justified in erecting the staunches, although their erection caused silt to accumulate, because they had no power, and were therefore under no duty, to cut the weeds. In *Geddis v. Bann Reservoir*, the proprietors were held to be liable because the plaintiff's land had been overflowed and damaged by a flood caused by the omission of the proprietors to dredge the silt out of a water-course which it was held they had a statutory duty to keep in proper order. Lord Blackburn in this case said (at p. 455): "No action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the Legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, 'negligence' not to make such reasonable exercise of their powers." These two cases show, as it seems to me, pre-

cisely what is the position of such a body as the corporation of Manchester. It is under a legal duty to exercise whatever legal powers it possesses for the purpose of protecting persons from damage by the works which it is under a statutory duty to perform. But their duty does not stop here. It has also been decided by two cases, which again complement each other, that it is their duty to use all reasonable means to inform themselves of the existence of an occasion for the use of those powers. These cases are the *Mersey Docks* cases, already referred to for another purpose, and the case of *Hammond v. Vestry of St. Pancras*, L. R., 9 C. P. 316. In the *Mersey Docks* cases, Lord Cranworth, then Lord Chancellor, said (at p. 122): "In the other case (the case of *Penhallow*) it must be taken as an established fact that the appellants had by their servants the means of knowing the dangerous state of the dock, but were negligently ignorant of it. It is plain, that if the appellants are liable in the former case, they must be liable also in the latter. If the knowledge of the existence of the mud bank made them responsible for the consequences of not causing it to be removed, they must be equally responsible if it was only through their culpable negligence that its condition was not known to them." The case of *Hammond v. Vestry of St. Pancras* was almost identical with the present case. A sewer, the existence of which was in fact unknown to the vestry, though it might have been ascertained by reasonable care and inquiry, became obstructed and caused damage. The jury found that the obstruction was not known to the vestry, and that it could not have been known to them by reasonable care, and it was held that under these circumstances they were not liable. Upon these authorities I hold, first, that the corporation of Manchester were under a legal duty to use such powers as the statute gave them to keep the sewer in proper order, and from time to time to inform themselves as to its condition; and secondly, that 14 and 15 Vict., chap. cxix, § 36 (private act), and 11 Geo. IV, chap. xlvii, § 58 (private act), gave them power to cause the sewer to be cleansed and repaired, and that the common law superinduced upon that power a duty to use it, and to use all reasonable means to inform themselves whether there was occasion to do so. Thirdly, that the findings of the jury show that the corporation

omitted to perform this duty, and so were negligent. Accordingly I give judgment for the plaintiff for the amount of damages agreed on between the parties, with costs.

Judgment for plaintiff.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, June 28, 1881.

Before TORRANCE, J.

BÆCKER v. FOREMAN et al., and THE BANK OF TORONTO, intervening.

Procedure—Intervention.

A demand in intervention may be made at any time before judgment.

PER CURIAM. After issue joined, trial was had before me on the 8th June, and the case was taken *en délibéré*. Since then an intervention has been filed by a third party, and the question is whether it should be allowed.

After consultation with my brother judges, seeing the precise terms of the Code as to interventions, I think there is no doubt that an intervention may be put in at any time before judgment.

The intervention, therefore, is allowed to be filed, and the *délibéré* is discharged.

Intervention allowed.

L. N. Benjamin for plaintiff.

Kerr, Carter & McGibbon for defendants.

R. & L. Laflamme for intervening party.

SUPERIOR COURT.

MONTREAL, June 27, 1881.

Before MACKAY, J.

COSSITT et al. v. LEMIEUX.

Capias—Special Bail—Statement.

A defendant who has given bail not to leave the country is not bound to file a statement and make the declaration of abandonment mentioned in Art. 764 C.C.P., within 30 days from the date of the judgment rendered in the suit in which he was arrested.

The case came up on a petition for *contrainte* against the defendant, for not having made a *bilan* and declaration of *cession de biens*.

On the 19th October, 1880, the plaintiffs obtained judgment against defendant for \$2,134.45.

Subsequently they caused a *capias* to issue against him, on the ground that immediately after judgment, and before execution issued thereon, he had been fraudulently secreting all his property and effects.

The defendant was arrested Dec. 23, 1880, and on the 27th of the same month was set at liberty, on giving security that he would not leave the Dominion of Canada without paying the plaintiffs' debt. On the same day, Dec. 27, he presented a petition to quash, and on the 27th April, 1881, the petition to quash was rejected (Taschereau, J.), the judge stating that the allegations of the affidavit were corroborated by the evidence.

On the 10th May, 1881, judgment was rendered by the Superior Court, declaring the *capias* good and valid.

On the 17th June, 1881, more than thirty days after the date of the judgment maintaining the *capias*, the present petition for *contrainte* was presented, on the ground that thirty days had elapsed, and the defendant not having deposited his *bilan*, nor made a declaration of *cession de biens*, was *contraignable par corps*. C.C. 2274, and C.S.L.C., cap. 87.

The defendant resisted the petition, assigning the following grounds:—

"Que le défendeur a été rendu à la liberté en fournissant cautionnement qu'il ne laisserait pas le pays;

"Que ce cautionnement spécial n'est pas forfait, et que partant le demandeur n'a aucun droit d'obtenir les conclusions de sa requête;

"Qu'en vertu du dit cautionnement et en vertu de la loi, le défendeur ne saurait être emprisonné pour les causes mentionnées en la dite requête."

MACKAY, J. The defendant was arrested 23rd December, 1880. He gave bail before the prothonotary on the 27th December, and was discharged in consequence. The condition of the bond was that he would not leave Canada without paying plaintiffs; his bail were bound to pay if he should leave without settling.

The plaintiffs now say that thirty days have passed since the judgment maintaining the *capias*, and no *bilan* or *état de ses biens* has yet been filed by defendant. *Contrainte* is asked, and the arrest of defendant.

The question as to the obligation of a defendant who has given special bail to file a

bilan has been so fully treated by Chief Justice Meredith in the case of *Poulet v. Launière*, 6 Q. L. R. 314, that it is unnecessary to go into it again. It was held in that case that a defendant who has given special bail is not bound to file a statement and make the declaration mentioned in Art. 766 C. C. P. I concur in that ruling, and the petition will therefore be rejected.

The judgment was as follows :—

" Considérant l'espèce de cautionnement qu'a fourni le défendeur le 27 Dec. 1880, et que, sous les circonstances, le défendeur n'était pas tenu de déposer au bureau du protonotaire un état de ses biens, et n'est pas contraignable par corps, renvoie et rejette la dite requête avec dépens," &c.

De Bellefeuille & Bonin for plaintiffs.

Pelletier & Ethier for defendant.

SUPERIOR COURT.

MONTREAL, July 7, 1881.

Before MACKAY, J.

BROWN et al. v. GUY et al., and PROULX,
plff. *par reprise*.

Woman séparée de biens—Authority to contract debt for necessities.

A wife séparée de biens does not require the authorization of her husband for the purchase of necessities.

PER CURIAM. This is an action on an account for goods sold and delivered, amounting to over \$260. The defendant is *separée de biens*, and bought the goods. There was no charge in the plaintiffs' books to the husband. The goods were always charged to the wife, and they were necessities. But it is said that even for necessities a woman *separée de biens* requires the authorization of her husband. I have often ruled against this pretension, and I cannot hold otherwise now. C. C. 1318 allows the wife *separée* perfect freedom to dispose of and alienate her moveable property, and to contract debts without her husband's authorization. (*Sic* Renssion, ch. ix. No. 28, Comm.; also Marcadé, vol. 5, p. 581.) Judgment will go for the plaintiff *par reprise*; but as to the amount, I do not see proof to warrant judgment for more than \$210.

The judgment reads as follows :—

" Considering that plaintiff and plaintiff *par*

reprise d'instance have sufficiently proved against the female defendant to entitle them, *nommément* the plaintiff *par reprise*, to a judgment against her for \$210 for goods sold and delivered—necessaries sold and delivered—to her as alleged in plaintiffs' declaration;

" Considering that the plaintiffs never charged the male defendant anything;

" Considering that in contracting for these things the female defendant acted by and for herself, and was so charged; that she was in so contracting only making acts of administration lawful to her, though *séparée de biens*, and that she was under the circumstances competent for such acts or contracts, but this judgment to be *exécutoire* only on or against her moveables or moveable property;

" Judgment accordingly for \$210 and costs."

T. Bertrand for plaintiff *par reprise d'instance*.

Barnard, Beauchamp & Creighton for defendants.

U. S. SUPREME COURT DECISIONS.

Maritime law—Collision—Ship drawn by tug—When both liable for negligence.—A ship and a tug towing it are in law one vessel, and that a vessel under steam, and it is their duty to keep out of the way of a sailing vessel. And where both the tug and the ship were under the general orders of the pilot of the ship, and were approaching a sailing vessel, which was seen both on the ship and on the tug, and the tug neglected to take the proper course to avoid a collision, and the pilot on the ship gave no direction to take such course, *held*, that both the ship and the tug were liable for the collision. Both vessels were responsible for the navigation. The ship, because her pilot was in general charge, and the tug, because of the duty which rested on her to act upon her own responsibility in the situation in which she was placed. The tug was in fault because she did not on her own motion change her course so as to keep both herself and the ship out of the way; and the ship, because her pilot, who was in charge both of ship and tug, neglected to give the necessary directions to the tug, when he saw or ought to have seen that no precautions were taken by the tug to avoid the approaching danger. Decree of U. S. Circ. Ct., S. D. New York, affirmed. — *Ship Covilita v. Perry*. — Opinion by Waite, C. J. — [Decided May 2, 1881.]

The Legal News.

VOL. IV. AUGUST 20, 1881. No. 34.

COPYRIGHT.

An important copyright case, *Dicks v. Yates*, was recently decided by the English Court of Appeals. The plaintiff published a story called "Splendid Misery" in parts in a weekly serial, which was duly registered. The defendant subsequently published a novel under the same title, in parts, which came out in a weekly newspaper. It was proved that in 1801 was published a novel under the same name by J. S. Surr. There was no evidence that the author of the story published in the plaintiff's serial had invented the title "Splendid Misery," or that he had not himself copied it. In a suit for damages, it was held by Jessel, M.R., James and Lush, JJ., reversing the decision of Bacon, V. C., (reported in 43 L.T. Rep. N.S. 470), that the plaintiff had no copyright in the title "Splendid Misery;" that the want of evidence as to invention by the author, of the title of the plaintiff's story would itself have been sufficient to disentitle the plaintiff to relief; that there must be something original in a work in order to give the author any copyright in it, and that, inasmuch as the title of the book had been used before, it could not be said that the author of the plaintiff's story had originated its title.

Lord Justice James stated that in his opinion, "there can be no copyright in the title or name of a book." Lord Justice Lush did not dissent from that, and the Master of the Rolls appeared to be of the same opinion.

POLICE INCITING TO CRIME.

The English *Law Times* notices a recent Scotch case, *Blaikie v. Linton*, 18 Scottish Law Reporter, 583, in which the judges of the Scottish Court of Justiciary had to consider the case of a person who had been entrapped into the commission of an offence. "This case," says our contemporary, "at once recalls to the mind the case of Thomas Titley, whose conviction for an offence, to the commission of which he had been incited by an employee of the police, gave rise to a good deal of observation some

months since, and formed the subject of a number of questions in the House of Commons. Having regard to that case, which was generally considered to reflect but little credit on English justice, the decision of the Scotch judges in reference to the same point, which was then raised, will be regarded with some interest. The charge against Blaikie, the appellant in the case, appears to have been preferred by the respondent on the appeal, who filled the office of Procurator Fiscal of the Edinburgh Police Court, at that court, and to have alleged that the appellant had committed an offence against the laws for the regulation of public-houses by trafficking in excisable liquors, viz., whiskey, and selling that article to a certain woman, named in the charge, without having obtained a certificate in that behalf. The facts proved were to the following effect: The appellant had a shop in Edinburgh, for which he had a dealer's license, authorizing him to sell not less than two gallons, but he had no retail license for these premises, though he did possess a retail license for other premises held by him also in Edinburgh, and at no great distance from the premises in respect of which the charge was preferred. The woman named in the charge as having purchased whiskey from the appellant in a manner not authorized by the terms of his license for the premises in question was a female turnkey in Edinburgh gaol, and was acting in collusion with the Edinburgh police, at whose suggestion she went to Blaikie's shop, and induced him to sell her a pint of whiskey, which was a less amount than was warranted by his dealer's license. The police magistrate convicted and fined Blaikie, and from this decision he appealed, alleging that the conviction was bad. One ground on which he maintained this contention was, that the charge was not properly drawn, but the substantial ground was that the conviction was vitiated by reason of the appellant having been entrapped and solicited by the police into committing a breach of his excise certificate. And he went on to plead that the woman to whom he sold the whiskey was not a *bona fide* purchaser, but was specially employed to entrap him, and that in order to do so she had refused, when requested by him, to go to his other premises, for which he had a retail license, but had induced him to give her the whiskey then and there by representations

as to the favor it would be to her if he would let her have the whiskey without going to the other shop. On these facts two things were clear: the one, that the appellant had, according to the strict letter of the law, committed an offence for which he was liable to punishment; the other, that but for the solicitations and inducements of the police no such offence would have been committed. On such facts Titley was convicted. The Scotch Court, however, thought it unnecessary to pronounce any considered opinions, but simply quashed the conviction, ordered the repayment of the fine, and gave the appellant his costs. In the Scotch and English cases alike, the action of the police may have been occasioned by an honest excess of zeal and a desire to obtain the punishment of one who was, they were well satisfied, an offender, but it would be as well that they, the guardians of law and order, should for the future refrain from inciting to offences against law and order, even though they may have suspicions as to what has occurred on former occasions."

BREACH OF PROMISE.

The action for breach of promise to marry applies the most prosaic of remedies to the most sentimental and romantic of complaints. The ashes are weighed on the cold altar after the sacred flame has gone out. Tender confidences, whispered protestations, the passionate phrases of love-letters, all those mysterious signs and symbols which love dotes upon, are carefully put together by twelve plain jurymen to establish a transaction, as though the wooing of a human heart were like bargaining for a pair of lungs. From this phase of life's tragedy, poets and romancers turn with a shudder. But to such sufferers as seek the courts, our common law imparts a consolation which ought, at all events, to expel the last symptoms of a lingering passion from the breast of the suitor.

We purpose, in these pages, to set before the reader the main principles pertaining to such promises, illustrating them more particularly by reference to our latest decisions.

1. *Foundation of the Right of Action.*—A contract to marry must be clearly distinguished from the marriage contract, or marriage institution, which rests upon solemn foundations of its own. Promises to marry have been treated

by the common law, from the earliest times, on the general footing of agreements. Policy forbids that specific performance of such a contract be enforced in equity. But, for breach of the promise an action would always lie for damages at the common law, as in other cases of *assumpsit*; though in aggravated cases we shall find damages assessed somewhat after the manner of a tort.

In the early reports, nevertheless, doubts were entertained as to the jurisdiction of common-law courts in such suits; and this because the contract to marry was so nearly allied with marriage, while marriage, from the time of Pope Alexander III, or the latter part of the twelfth century, was in England a matter for the cognizance of spiritual or ecclesiastical courts only. A motion to arrest judgment, where the plaintiff had a verdict, was argued on this ground, in *Holcroft v. Dickenson* (Cart. 233), in 25 Charles II., but three of the four judges (Chief-Justice Vaughan dissenting) pronounced in favor of the plaintiff.

This historical uncertainty concerning the practice of bringing the common-law action in common-law courts, was adverted to in a recent Indiana case (*Short v. Stotts*, 58 Ind. 29,) where counsel for the defence made the very ingenious argument, that, at the first settlement of the United States, there was no such common-law right of action at all. *Stretcher v. Parker* (1 Rolfe's Abr. 22,) decided in 1639, was, as counsel contended, the earliest breach of promise case ever maintained in England, in a common-law court.

Admitting all this, however, the question in Coke's day was one of jurisdiction local to England, and the doubt did not touch the right of action at all. "Indeed," observes Worden, J., "the principle which upholds such action is as old as the principle which gives damages in any case for the breach of a contract; and it is immaterial whether any case can be found in England, prior to 1607, in which such action has been maintained. (58 Ind. 29, 35.)

2. *Parties to the Action.*—In practice, it is found that the suit for breach of promise is almost exclusively a woman's weapon; not, we may imagine, because those light perfidies are wholly on the man's part, nor necessarily because, when injured, he feels the humiliation less, but rather on account of sexual differences of tem-

perament and disposition. If the promise to marry does not bind one of two adults, neither on principle, ought it to bind the other; and hence the right to sue for breach is against the party who breaks the promise, of whichever sex this may be. *Harrison v. Cage* (12 Modern, 214,) is an English case, of William III's time, where the discarded lover actually sued his false mistress, and won a verdict; and this strange reversal of the sexes, in the face of justice, did not deter the Court from declaring unanimously that the plaintiff was entitled to judgment.

The usual contract rules apply as to the competency of parties. A lunatic's promise to marry would not bind that party; nor does a minor's, unless the minor ratifies the engagement on reaching majority. And here we may observe that the age at which a marriage binds a male or female is one thing, and the age of majority for the marriage promise, another—the considerations of policy applying quite differently. A late English statute requires more than a ratification—to wit, a new and distinct contract—in order to bind an infant, on his promise, after he has come of age, and this statute covers promises to marry. (*Detcham v. Worrall*, L.R., 5 C.P. 410.)

3. *What constitutes the Promise to Marry.*—The general principles which underlie the whole law of contract must determine when and in what manner parties become bound to this most solemn of mutually dissoluble contracts. The practical difficulties are these: Sexual fascination, not to add the very solemnity of such affairs, will draw a light-minded person very close to a promise, who does not intend one; even with the serious, the disposition is to leave more to inference than plain expression; and, moreover, mere favors and attentions on the one hand, or, on the other, deliberate arrangements between man and woman for dalliance and loose companionship, by no means amount to promises to marry.

If a man seriously and directly asks a woman to marry him, and she accepts with equal seriousness and directness, the case is a clear one of promise to marry; and the more so, if these terms have passed in writing. But doubts must arise where, as so often happens, circumstances less positive are relied upon to establish the engagement.

Some mutual contract to marry is requisite

in order that one may sustain an action for breach of promise; but no particular form of words can be pronounced essential. It is sufficient if such language were used as to show that, in fact, the minds of the parties met. (*Homan v. Earle*, 53 N.Y. 267.) And, while the mutual intention should be serious and honorable, serious and honorable intentions may be presumed in any case from acts and declarations justifying that inference; for, where one so conducts as to induce the other to believe there is an engagement between them, and to act accordingly, and yet, after knowing that impression is produced, keeps on in the same tenor, such party, it is said, cannot set up a light or jesting purpose afterwards, or deny that the engagement in fact existed.

But as to the evidence of a contract to marry, more direct proof is now commonly required than formerly, since modern statutes permit parties themselves to take the stand and tell their own story. While the old rule prevailed, excluding such interested witnesses, the contract was sometimes inferred from proof rather of such circumstances as usually attend an engagement. "This rule," observes Chief-Justice Church, "permitted an implication from what was proved of a contract not proved." Whatever the expression of earlier cases, then, a promise to marry cannot commonly be inferred alone at this day from one's devoted attention, frequent visits, and apparently exclusive attachment; nor from mere presents, or letters not to the point; nor from the plaintiff's sole announcements to friends, or her wedding preparations, without the defendant's knowledge; nor from what the man's mother or father may have said to the woman, without his knowledge, and *vice versa*; nor from the woman's unexplained possession of an engagement-ring. Neither a mere courtship, nor even an intention to marry, can constitute, *per se*, a contract to marry.

But the giving and accepting of an engagement-ring, if properly shown, is a most important circumstance. And the understanding of a marriage intention having been once elicited, from pertinent words, acts, or conduct of the parties to the transaction, we may find their courtship, their correspondence, the presents which passed between them, and the like, all material in their bearing upon the main conclusion, and still more material for fixing the

amount of damages to be awarded in the suit.

Homan v. Earle is an important illustration of our general principle, both because of Chief Justice Church's lucid exposition of the law, and the delicate shading of the facts. Here, a woman, evidently without reproach, had been led into a marriage engagement by a man whose conduct seems to have been purposely ambiguous. As the Court observed, both parties to the suit were highly respectable, belonging to the same church, equals except in pecuniary resources, the plaintiff about thirty, and the defendant fifty. The defendant, left a widower, began his visits soon after the death of his first wife, to the plaintiff, who had been her intimate friend. His visits grew longer and more frequent; there were rides, and walks, caresses and the usual endearing words. He gave the woman to understand that his wife had said something in her favor before she died. He spoke significantly of intending to marry when the year was out; of taking a wife of a certain description, which she answered; of expecting her to know, some day, all his business. She cautioned him, after he had gone on in this way for two months, that she considered this meant a great deal, and at the same time she offered him his freedom. This warning only made him press his suit the more ardently, though he was far from making himself explicit. But, coming to her after a few days' absence, he made, as she testified, a formal declaration of love, which she reciprocated. The two were then separated for six weeks; after which the visits went on during a brief season, much as before. By this time, however, a curious proceeding on the man's part leaves us to infer that he had begun courting another woman, with whom he had lately become acquainted, and whom, in fact, he married about six months afterwards. Drafting a letter one day with his own hand, to the effect that the plaintiff regarded his visits as evidence of friendship, and "nothing more," he persuaded her to copy and sign it. He wished this, he told her, because he did not want others to think they had any understanding together so soon after his wife's death. The defendant's conduct, when his new engagement came out, indicated that he was conscious of having wronged the plaintiff. The Court refused to disturb a verdict rendered for the woman on these facts, notwithstanding "negative evi-

dence," such as the absence of presents, a ring, letters, and definite plans of marriage.

(To be continued.)

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, April 25, 1881.

DORION, C.J., MONK, RAMSAY, CROSS & BABY, JJ.

MILLER (def. below), Appellant, and COLMAN *et vit*, (plffs. below), Respondents.

Executor, Liability of—Right to interest on monies advanced.

The action was an action to account, and the appellant, by the final judgment of the Court below, was condemned to pay the female respondent the sum of \$41,278, and interest.

In appeal, the judgment was reversed (Baby, J., dissenting), and the action dismissed, the incidental demand of the appellant being, moreover, maintained to the extent of \$590.07. The questions of fact were extremely numerous. On the questions of law the majority of the Court held:

1. That executors are responsible only for monies actually received by them, and are not responsible jointly and severally for each other's administration.
2. That when a person, besides being executor, acts as if he were tutor (though not really so) of the minor to whom the estate he administers belongs, he cannot charge interest on monies expended by him in excess of his receipts.
3. That an executor, under the circumstances above mentioned, has, however, a right to claim interest on all interest-bearing debts paid by him on behalf of the minor, in order to prevent the sacrifice of the minor's real estate.

A. & W. Robertson for Appellant.

S. Bethune, Q.C., and J. Doutré, Q.C., Counsel.
Lacoste, Glopensky & Bisailon for respondents.

COURT OF REVIEW.

MONTREAL, April 29, 1881.

SICOTTE, RAINVILLE, JETTÉ, J. J.

(From S. C. Iberville.)

LA SOCIÉTÉ PERMANENTE DE CONSTRUCTION DU DISTRICT D'IBERVILLE v. ROSSITER, and MAIGUIRE *ès qual*, *en reprise d'instance*.

Building Societies—Discount of negotiable paper.

A loan by a Building Society on the security of a promissory note (the transaction being in effect an ordinary discount) is not illegal.

The authorization of such loans is not ultra vires of the local legislature.

In rendering the judgment inscribed in Review, the Court below (Chagnon, J.,) made the following observations :—

PER CURIAM. La question soulevée dans la présente cause est des plus importantes, tant à raison de la position qu'occupe cette société dans ce district, ayant à sa tête les hommes les plus recommandables, que par l'étendue des affaires qu'elle y transige.

Il s'agit de savoir si la demanderesse, en vertu de sa constitution telle que la législation la lui a donnée, a le droit ou le pouvoir d'escompter des billets et effets négociables.

Il n'y a aucun doute, quant à la question de fait, que le billet poursuivi est bien le renouvellement d'un billet escompté. Il est admis par le Président de la Société que la demanderesse faisait le commerce d'escompte sur une grande échelle, et L'écuyer, le secrétaire, dit que pas moins de la moitié des fonds de l'association était employée dans ce genre de commerce ; en transquestions cependant il se sert du mot *prêté* au lieu du mot *escompté*, et il dit que sur cette moitié de fonds de l'association plus que la moitié était prêtée à des actionnaires sur la garantie de leurs billets, ce qui laisserait un peu moins du quart des fonds utilisé pour faire l'escompte de billets étrangers. Nonobstant le mot *prêté* dont se sert le secrétaire dans ses transquestions seulement, l'ensemble de la preuve constate suffisamment qu'on escomptait au bureau de la Société plutôt qu'on ne prêtait sur billets, et que lors de l'escompte du billet originaire les parties au billet, en y comprenant celui qui présentait le billet pour escompte, n'étaient pas membres ou actionnaires de la Société, et il est aussi prouvé que les parties au billet subséquent n'ont jamais été membres de la Société. Enfin la preuve établit, suivant moi, sans aucun doute, que la demanderesse faisait le commerce d'escompte d'effets négociables sur une échelle assez considérable, et que spécialement le billet poursuivi est un renouvellement d'un billet aussi négociable précédemment escompté.

Le commerce ainsi fait par la demanderesse eut-il été même peu considérable, eut-il même été restreint à l'achat d'un seul billet, le contrat serait tout de même entaché d'illégalité et nul, si la demanderesse, en faisant tel achat, avait agi contre les dispositions de sa charte et avait outrepassé ses pouvoirs. Or je crois que le statut de Québec 36 Vic., ch. 78, pas plus que le statut fédéral 42 Vic., ch. 76, pas plus que le ch. 69 des statuts refondus du Bas Canada, relatifs à la formation des sociétés de construction dans cette province, ne lui conféraient ce pouvoir. Nul doute que le ch. 69 des statuts R. B. C. ne le lui conférât pas, la demanderesse l'admet elle-même, mais elle se repose pour faire reconnaître par les tribunaux la légalité de son acte sur le statut de Québec 36 Vic., ch. 78. Cet acte de la législature ne paraît avoir voulu ajouter au ch. 69, quant à la matière se rapportant au placement des fonds de la demanderesse, que le pouvoir de faire tels placements sur des garanties mobilières ou personnelles. Le ch. 69 y pourvoyait déjà jusqu'à un certain point en disant, s. 27, "chaque telle société pourra faire des prêts aux membres sur garantie de placement en actions non prêtées de la dite Société, prendre et recevoir d'aucune personne ou corporation toute garantie immobilière ou personnelle de quelque espèce que ce soit, comme sûreté collatérale pour tous prêts faits aux membres de la Société ;" mais comme on le voit, cette section n'avait de rapport qu'aux prêts faits aux membres de la Société.

Et lorsque le même acte parlait des prêts à d'autres personnes qu'aux membres de la Société, il n'autorisait plus l'offre d'une garantie personnelle, mais bien d'une garantie immobilière seulement, voir s. 11, de l'acte de 1869.

C'est probablement pour cela que la demanderesse, voulant élucider ses droits et ses pouvoirs par la législation, aurait cherché à obtenir et aurait de fait obtenu la passation de l'acte de Québec 36 Vic., ch. 78, permettant le placement (*loan* dans la version anglaise) de ses deniers entre les mains de toute personne, actionnaire ou autres, sur toute garantie immobilière ou personnelle qui pourrait être offerte, pourvu que les directeurs l'acceptassent. Or le commerce d'escompte de billets négociables peut-il être compris dans les *loans* ou placements de deniers autorisés par cet acte ? Je ne crois pas que telle soit la signification que nous devons donner

à cet acte. Le prêt dont il y est question, avec garantie sur une propriété mobilière, ne peut être considéré comme étant à aucuns égards la cession, transport ou vente d'un effet négociable caractérisant le commerce d'escompte, et dans l'espèce on ne peut douter de l'espèce de contrat fait entre les parties, car la demanderesse, dans sa déclaration, invoque le transport ou cession du billet pour valeur reçue comme étant le contrat qu'elle a fait avec le défendeur. Or ce transport ou cette cession d'effets négociables, en un mot ce commerce d'escompte d'effets négociables, ne peut trouver sa justification dans cet acte de Québec qui ne fait qu'amender certaines parties du ch. 69, et qui n'opère aucun changement dans les fins de l'association.

Il me paraît d'ailleurs que ce commerce d'escompte d'effets négociables fait partie de ce qu'on appelle le commerce de Banque. Le ch. 64 des statuts refondus du Canada, en force lors de la mise en vigueur du Code Civil, définissait ce qu'on devait entendre par le commerce de Banque, voir s. 1. " Pour les fins de cet acte le commerce de Banque signifie la confection et l'émission des billets de Banque, le trafic des lingots d'or et d'argent et des lettres de change, l'escompte de billets, lettres de change et effets négociables, et toutes les autres transactions qui appartiennent légalement au commerce de Banque." Or les corporations créées en vertu des lois en force en cette province sont frappées de certaines incapacités, parmi lesquelles on trouve celle énoncée en l'art. 367 du Code Civil, à l'effet qu'elles ne peuvent faire le commerce de Banque, excepté qu'elles y soient spécialement autorisées par l'acte qui les constitue. Il aurait donc fallu un pouvoir spécial donné à la demanderesse pour faire ce genre de commerce.

Or non seulement la Législature de Québec, d'après l'acte de la confédération aurait été impuissante à conférer ce pouvoir à la demanderesse, en supposant qu'on pourrait prétendre que ce pouvoir est inclu dans l'acte 36 Vic., ch. 78, mais l'acte fédéral 42 Vic., ch. 76, sur lequel la demanderesse s'appuie pour prétendre qu'elle y est autorisée, ne confère non plus aucuns tels pouvoirs. Cet acte 42 Vic., ch. 76, est un acte fait d'une manière excessivement négligée quant à l'énoncé des pouvoirs qu'on prétend y rencontrer; cet acte n'a qu'une seule section à part du préambule, et cette section dit : *It shall be law-ful for* la Société Permanente de Construction

du District d'Iberville, at any time within a year from the date hereof, to increase the capital stock to one hundred thousand dollars, and in the meantime to continue to carry on business as heretofore, with its present paid-up capital of fifty thousand dollars.

Cet acte, d'après la phraseologie de cette section, n'irait donc qu'à autoriser la demanderesse à continuer ses affaires avec son capital payé comme elle l'avait fait par le passé, une année lui étant accordée pour augmenter son capital jusqu'à \$100,000, mais on trouve dans cet acte un pouvoir donné de faire le commerce en question, parceque dans le préambule, l'acte 36 Vic., ch. 78 serait mentionné comme conférant ce pouvoir, d'où, dit-on, le parlement doit être censé l'avoir ratifié.

Voici le préambule : " *Whereas*, la Société Permanente de Construction du District d'Iberville was under the provisions of chapter 69 of the Consolidated Statutes for Lower Canada constituted a body corporate in the town of St. Johns, in December, 1868; *whereas*, in the year 1872, by an Act passed by the Legislature of Quebec, 36 Vic., ch. 78, further powers were conferred upon the said Society in relation to the investment of its surplus funds either in public securities or in Bank stock, or as a loan to any person, whether a shareholder in the stock of the society or not, and *whereas* under an Act of the Parliament of Canada, in the year 1877, 40 Vic., ch. 50, the said Society cannot receive money on deposit or borrow upon debentures, except upon condition of having a paid-up capital of \$100,000; and *whereas* the said Society has only a paid-up capital of \$50,000, but is willing to increase it to \$100,000 if time be given for the purpose."

Maintenant suit la section plus haut citée, " *It shall be lawful for the society, at any time within one year, to increase the capital to \$100,000, and in the meantime to continue to carry on business as heretofore with its present paid-up capital of \$50,000.*" L'on voit que la partie dispositive de la loi nonobstant la citation de l'acte de Québec 36 V. ch. 78 dans le préambule, ne contient rien qui augmente les pouvoirs que la demanderesse avait eus jusque là, relativement à l'escompte d'effets négociables. Tout ce que cet acte veut et entend dire, c'est que la demanderesse pourra continuer de marcher avec son capital payé de \$50,000, sans

perdre le bénéfice de ses dépôts, pourvu qu'elle augmente son capital, aux desirs de l'acte du Parlement du Canada 40 Vic. ch. 50, en aucun temps dans le cours d'un an d'alors. Il n'y a rien dans cet acte qui confère à la demanderesse le privilège de faire le commerce de banque.

D'ailleurs en supposant que cet acte devrait être considéré comme ratifiant l'acte de Québec 36 Vic. ch. 78, il ne ferait dans tous les cas rien de plus que de confirmer les pouvoirs énoncés dans ce dernier acte. Or cet acte de Québec comme le dit d'ailleurs le préambule de l'acte fédéral, ne permet à la demanderesse de placer le surplus de ses fonds que dans les fonds publics ou de banque ou comme *prêts* à aucune personne, l'acte de Québec ajoutant, *garantis* sur aucune propriété immobilière ou personnelle.

Le Législateur avait ses vues probablement lorsqu'il défendait aux corporations le commerce de banque à moins qu'elles y fussent spécialement autorisées, le commerce de banque entraîne certaines responsabilités et obligations auxquelles les corporations ordinaires, si elles eussent été autorisées à le faire, n'auraient pu se soustraire. Et l'escompte d'effets négociables fait partie de ce commerce.

Si on devait adopter la prétention de la demanderesse à l'effet que cet escompte n'est au fond qu'un placement, avance ou prêt de ses deniers qu'elle fait sur la garantie du billet qui lui est transporté; que voudrait alors dire l'escompte? En fait, il n'y aurait plus ce que la loi appelle l'escompte d'effets négociables; l'escompte ne serait qu'un prêt fait sur une garantie mobilière ou personnelle. Pourquoi alors, si escompte et prêts sur garantie mobilière et personnelle sont la même chose, ne pas avoir introduit dans l'acte de la Législature de Québec une clause, n'offrant pas d'ambages, et disant en propres termes que cette société aurait le droit de faire l'escompte de billets négociables? Pense-t-on qu'en supposant que la Législature de Québec eut eu ce droit, les banques ne se fussent pas récréées, et que le Législateur aurait laissé passer cette clause sans récriminations? Pour éviter le rejet d'une telle clause on s'est servi de mots plus inoffensifs en apparence, c'est à dire qu'on a dit que la société ne ferait que des avances ou prêts sur des garanties mobilières et personnelles, or qu'elle se conforme à la lettre comme à l'esprit de cette clause et qu'elle fasse des prêts accompagnés

de garanties fournies par le prêteur, et que l'action de la société fondée sur ce prêt fasse des allégations en rapport avec ses pouvoirs, c'est-à-dire qu'elle base son action sur un prêt fait à un tel, garanti par tel effet, autrement le droit de faire l'escompte serait inutilement conservé aux banques.

L'escompte n'est pas un prêt mais c'est la vente, transport ou cession d'un effet négociable pour valeur fournie, et ce commerce est connu sous le nom d'escompte, et ce commerce est interdit aux sociétés par l'esprit et les termes de leurs chartes ou actes d'incorporation.

Le contrat allégué et prouvé étant donc dans sa nature un contrat illégal et ultra vires est nul, il est le résultat d'une violation d'une loi prohibitive et il n'a pu produire qu'une nullité. Et cette nullité résultant d'un excès de pouvoirs doit avoir l'effet d'absoudre non seulement la partie qui l'a invoquée mais toutes les parties au billet, et spécialement l'autre défendeur John Rossiter.

Depuis la législation faite par l'acte 36 Vic., ch. 78, au profit de la demanderesse, législation amendante seulement le ch. 69 des Statuts Ref. du B. C., un autre acte a été passé dans la législature de Québec modifiant et amendement encore le ch. 69 des Stat. Ref. B.C. relativement à toutes les sociétés de construction formées sous l'empire de ses dispositions, et l'on voit encore dans cet acte la disposition relative au placement des deniers des sociétés de constructions réglée dans la section 4 de cet acte, et cette section dit encore (voir s. 4, 42 et 43 Vic., ch. 32) que "such society may lend money at a rate of interest to be lawfully agreed upon to any person or persons, or any body corporate, without requiring any of such borrowers to become subscribers of the stock, provided that such loan be effected either on the security of shares of the society, or on hypothecary or on public securities," et dit la s. 31: "All the provisions of ch. 69 of the consolidated statutes for Lower Canada, intituled an Act respecting Building Societies, which may be inconsistent with the present Act, are repealed." L'on voit par tous ces actes que l'espèce de placement autorisé pour les sociétés de constructions par tous les actes susmentionnés, y compris l'acte 36 Vic., ch. 78, est le prêt et non le commerce d'escompte.

Dans la cause de *Boulé v. Paré* la question

soulevée n'était pas la même. Boulé avait payé le billet de Paré à la société de construction qui en était alors le porteur, Boulé était tenu au paiement comme endosseur, c'était Paré qui l'avait escompté à la société. Boulé ne s'est pas laissé poursuivre par la société, il a payé et il a demandé son remboursement à Paré, sur le principe qu'il avait payé sa dette. La question n'était qu'entre l'endosseur et le faiseur, la société était désintéressée.

Il n'y a pas besoin de dire que je désirerais que cette cause fut portée en appel, le point discuté le mérite. Les directeurs de cette société ont fait le commerce indiqué de bonne foi, s'y croyant autorisés par l'acte de Québec, et j'espère qu'ils feront consacrer leurs pouvoirs sous ce rapport d'une manière précise au moins par le premier tribunal de la Province, afin que si, en faisant ce commerce, ils contreviennent à la loi, ils puissent vis-à-vis du public, apporter remède à la position fautive dans laquelle ils auraient pu entrer. La question ne manque pas de difficulté, et c'est justement pour cette raison que l'autorité d'un tribunal plus élevé dans la hiérarchie judiciaire doit être obtenue. Je comprends que la demanderesse a déboursé des fonds dans l'espèce, fonds qui ont pu profiter à quelqu'une des parties au billet. Si la demanderesse a un recours contre les parties qui ont bénéficié de ces fonds, ce ne peut être par voie d'une action libellée comme la présente l'a été.

Action déboutée avec dépens.

The judgment in Review was as follows :—

“ La cour, etc. . . .

“ Considérant que d'après les titres qui constituent la société permanente de construction du district d'Iberville, la demanderesse est autorisée à prêter et placer ses fonds sur des garanties hypothécaires ou personnelles jugées suffisantes par les directeurs de la société ;

“ Considérant que la demanderesse pouvait d'après les lois spéciales qui la régissent prêter aux défendeurs les argents qu'elle leur a avancés et qu'elle réclame par son action ;

“ Considérant que des prêts de cette nature ne constituent nullement le commerce de Banque en autant qu'il est prohibé aux particuliers, mais sont des faits ordinaires tombant dans le cadre des choses concernant la propriété et les droits civils et permis à toute personne ;

“ Considérant que dans le commerce de Ban-

que il n'y a que l'émission des billets servant comme monnaie qui soit prohibée aux personnes qui ne sont pas incorporées comme Banque ;

“ Considérant que la législature de Québec a le droit de donner pouvoir aux corporations de faire le commerce de Banque en autant que ce pouvoir n'est pas en conflit avec les restrictions imposées par la loi fédérale ;

“ Considérant que donner pouvoir à une corporation d'escompter des billets n'est qu'étendre les pouvoirs de cette corporation et l'assimiler quant à ceux d'une personne privée, et que ce n'est pas légiférer sur une matière ayant trait aux banques, mais seulement sur les pouvoirs civils de telle corporation ;

“ Considérant que les défendeurs ont obtenu de la demanderesse la somme qu'elle réclame, et qu'ils en ont reçu le profit ;

“ Considérant qu'ils ne peuvent se refuser à restituer le bien d'autrui même si la demanderesse aurait dû exiger des garanties hypothécaires pour le remboursement des avances faites ;

“ Considérant que le défendeur Thomas Maguire est mal fondé dans ses défenses, et que la demanderesse a justifié sa demande ;

“ Considérant qu'il y a erreur, etc.”

Judgment reversed.

E. Z. Paradis and Duhamel & Co., for plaintiffs.

Macdonald & Loupret, for defendant.

S. Bethune, Q.C., Counsel.

GENERAL NOTES.

Some legislatures, in their fervid abhorrence of the traffic in intoxicating liquor, have placed singular enactments on their Statute book. The Connecticut legislature has made a law providing that a man may be criminally punished on proof that *he is reputed to keep a place where intoxicating liquors are sold without license*. The Supreme Court holds this act not unconstitutional, but leaves the defendant at liberty to show that the reputation is unfounded.

UNIVERSITY COLLEGE, TORONTO.—The University was first opened in 1827, with the Rev. John McCaul, LL.D., filling the chair of Classical Literature, and being also President of the college. More than 1,200 students have matriculated in the Faculty of Arts, and more than 800 degrees therein have been conferred. The number who matriculated in the Arts Faculty in 1878 exceeded 100, and at the June examinations in 1879, 150 candidates presented themselves, from forty or more of the local colleges, or high schools, one or more of which are to be found in every county of the Province. In the year 1878 there were 329 undergraduates in the Arts Faculty, being in the first year 121, second year 93, third year 63, and in the fourth year 53. There are thirty-nine scholarships in the Faculty of Arts, in sums of \$150, \$100, and \$80 respectively.

The Legal News.

VOL. IV. AUGUST 27, 1881. No. 35.

SEIZURE OF IMMOVABLES.

The judgment in *Corbeil v. Charbonneau*, noted in the last volume of the Legal News, p. 381, has been reversed by the Court of Review. The question was whether immovables could be seized under a writ of *saisie-arrest avant jugement*. The Court of Revision holds that the words *biens et effets*, employed in Art. 834 of the Code of Procedure, do not include immovables.

MENTAL SUFFERING AS AN ELEMENT OF DAMAGES.

In a recent issue of the *Albany Law Journal*, a number of authorities are collated on a point of considerable interest, viz., the appreciation of mental suffering as an element of damages in actions of negligence. "There can be no doubt," says the writer, "that mental suffering forms a proper element of damage in actions for intentional and wilful wrong, and in actions of negligence resulting in bodily injury; but whether it forms an independent ground of action, disconnected from these facts, is more doubtful.

"In *Sorelle v. Western Union Tel. Co.*, Texas Commission of Appeals, June 14, 1881, 4 Tex. L. J. 747, it was held that injury to feelings resulting from disappointment and grief at not being present at a relative's funeral, caused by neglect of a telegraph company in failing to deliver a message, constitutes general damages. In this case the message showed on its face the nature of the summons. The court said: 'It appears to us that the natural consequence of a failure to promptly transmit and deliver a message like that in this case, and under the circumstances shown in appellant's petition, is to produce the keenest sense of grief incident to a sad disappointment. For it is a principle of our nature, implanted in the bosom of every reasonable being, not devoid of human sensibilities, to promptly pay the last tribute of respect to the mother who bore and fostered us; and to be thwarted in the discharge of this duty, prompted as it is by natural desire, by the will-

ful fault or neglect of one whose business it is to communicate the news, and who has received his compensation therefor, in the very nature of things, is calculated to, and will, inflict upon the mind the sorest sense of disappointment and sorrow.'

"In *Shearm. & Redf. on Neg.*, in speaking of telegraphs, it is said: 'Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings, which cannot be easily estimated in money, but for which a jury should be at liberty to award fair damages.'

"But in *Wyman v. Leavitt*, Maine Supreme Court, 23 Alb. L. J. 253, it was held that anxiety in respect to one's personal safety is not a proper ingredient of damages in an action of negligence for an injury caused to property alone by blasting. The court there said: 'We have been unable to find any decided case which holds that mental suffering alone, unattended by any injury to the person, caused by simple actionable negligence, can sustain an action.' 'If the law were otherwise, it would seem that not only every passenger on a train that was personally injured, but every one that was frightened by a collision or by the train's leaving the track, could maintain an action against the company.' In the principal case two Texas cases are cited as authority, but in both of them there was injury to the person. *Canning v. Williamstown*, 1 Cush. 451; *Lynch v. Knight*, 9 H.L. 598; *Johnson v. Wells*, 6 Nev. 224; S.C., 3 Am. Rep. 245, seem opposed to the doctrine of the principal case. *Canning v. Williamstown*, however, was founded on a statute providing only for injury to the person, and *Johnson v. Wells* seems overruled in *Quigley v. Railroad*, 11 id. 350.

"Mr. Wood says in a note, in his edition of *Mayne on Damages*, p. 74: 'We do not apprehend that the rule has any such force as to enable a person to maintain an action when the only injury is mental suffering, as might be thought from a loose reading of loose dicta and statements of the courts in some of the cases. So far as I have been able to ascertain the force of the rule, the mental suffering referred to is that which grows out of the sense of peril, or the mental agony at the time of the accident, and that which is incident to and blended with

the bodily pain incident to the injury, and the apprehension and anxiety thereby induced. In no case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground of action.' Mr. Sedgwick seems to take the same ground. Meas. Dam. 544, note; and app. 551, he says: 'It is evident that the injury here becomes of a very metaphysical character.' Shearman & Redfield say, in their work on Negligence, § 606 b: 'The mental suffering which may be allowed for is only such as arises from the plaintiff's reflections upon what he personally has to endure, or anxiety for his escape.'

"In *Logan v. Western Union Tel. Co.*, 84 Ill. 468, an action by a father against a telegraph company, for negligence in failing to deliver a telegram sent by him to his son summoning the son home to the death-bed of his mother, it was held that the plaintiff was entitled to recover at least nominal damages, including the price paid the company to send the dispatch. Nothing beyond this was considered.

"Judge Thompson says (*Carriers of Passengers*, 571): 'Whether mental anguish caused neither by fear nor bodily injury—such for example, as arises from the indignity of ejection from a train without violence—is an element of compensatory damages, is a question upon which the authorities are not quite fully agreed.' 'That injuries done can have no adequate redress in money, or that damages may be difficult of estimation, is no reason why pecuniary relief may not be granted as a compensation.' But this line of cases is different from those of negligence, because in them the act complained of is intentional, although without bodily injury; and besides, there is a physical constraint which amounts to assault or trespass.

"The case of *DeMay v. Roberts*, ante, 23, is distinguishable from the principal case, perhaps, because although there was no intentional injury, and the injury was wholly to the feelings, yet there was an intentional act, namely, the entry into the house, which under the circumstances was a trespass.

"In the principal case the court added the following judicious warning: 'It should be remarked that great caution ought to be observed in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of the parent or

other relative, with the disappointment and regret occasioned by the fault or neglect of the company, for it is only the latter for which a recovery may be had, and the attention of juries might well be called to that fact.' This shows the danger of the holding. It is difficult to draw the line between the grief of bereaved affection and the disappointment occasioned by not being able to attend the funeral."

APPOINTMENTS.

The last issue of the *Canada Gazette* contains the names of twenty-three gentlemen, all of Ontario, appointed by the Deputy of the Governor General, to be Her Majesty's counsel. The following is the list: Richard Martin, Hamilton; Samuel Smith McDonell, Windsor; Hon. Alexander Morris, Toronto; Allen R. Dougall, Belleville; John Charles Bykert, St. Catharines; John Creasor, Owen Sound; Samuel Jonathan Lane, Owen Sound; Thomas Wardlaw Taylor, Toronto; George D'Arcy Boulton, Toronto; Henry Burkett Beard, Woodstock; Byron Moffatt Britton, Kingston; William Lount, Barrie; William H. R. Allison, Picton; Robert Smith, Stratford; Hon. William McDougall, C.B., Ottawa; James Kirkpatrick Kerr, Toronto; Thomas Deacon, Pembroke; Alexander Shaw, Walkerton; George Dean Dickson, Belleville; John McIntyre, Kingston; Adam Hudspeth, Lindsay; John Edward Rose, Toronto; Charles Moss, Toronto.

BREACH OF PROMISE.

[Concluded from p. 268.]

4. *Promises to Marry, as affected by the Statute of Frauds.*—Treating promises to marry like all other contracts, we find old authorities assuming that, where the contract is not to be performed within a year, it is void under the Statute of Frauds unless expressed in writing. Thus, if A., in January, 1880, promises to marry B. in February, 1881, B. cannot feel sure that the engagement binds, unless the promise is put in black and white.

But the latest cases incline to construe the statute so as not to affect promises to marry, but promises in consideration of marriage, such as marriage settlements. Where A. promises to marry B. within thirteen months, two years, etc., such a promise does not come under the

statute at all, for it is capable of being performed within a year, and that is enough. An agreement to marry may commonly be regarded as a continuing contract by mutual consent, and hence, unaffected by the statute.

5. *At what Time a Promise to Marry may be regarded as broken*—If a person engaged to marry B., marries C. instead, such party puts it out of his or her power to fulfill the former engagement, and B. may sue at once for breach of promise. If, again, the wedding with B. was fixed for a certain day, and A. inexcusably fails to appear, B., who was ready, may treat the contract as broken. And modern precedents, moreover, both in England and the United States, favor the rule, that a breach of contract arises upon a positive refusal to perform, although the time specified for performance has not yet arrived. Hence, where parties had engaged to marry "in the fall," fixing no day, and the man, in October, announced his determination not to perform the contract, it was held that the woman might bring her action immediately.

But, on principle, some tender should precede all such common-law suits; and the plaintiff (due allowance being made for the natural modesty of the sex) ought to allege and prove an offer and refusal. Readiness, however, is held to be enough on a woman's part, since it is for the man *ducere uxorem*.

6. *Rescission of a Contract to Marry*—A mutual release from a marriage engagement is the true way for parties to get rid of it. They who enter into such a promise mutually, have mutually the power to rescind. But such a release must have been fairly and honorably procured, in order to avail the party who sets it up. The man or woman who breaks off an engagement discharges the other party; but the latter has the option of treating this as a breach, and making it the foundation of a suit for damages. The reasons upon which the defendant seeks to justify breaking it off, may, however, be shown, in mitigation of damages. Release of the promise, like the promise itself, may usually be by word of mouth.

7. *When Promises to Marry are against Public Policy*.—If there is any one thing that a woman clearly understands, it is that a man who is already married is not at liberty to take her to wife. The thought of making a mar-

riage under such circumstances is a moral sin, while the passionate compact to do so, when opportunity shall occur, not only places the promising parties in a most perilous relation towards one another, but doubly exposes the conjugal party, whose rights obstruct their inclination, to wanton and wicked sacrifice. And yet, so blind is jealousy, or the guilty passion, that we find woman, in two States, fighting her way to the tribunal of last resort, quite recently, for the purpose of compelling a fickle man to pay damages, who had agreed, when married, to marry the plaintiff as soon as death or divorce should rid him of his wife. It is well that in both these States (New Jersey and Illinois) the agreement was pronounced contrary to public policy, and void. (*Noice v. Brown*, 39 N.J.L. 228; *Paddock v. Robinson*, 63 Ill. 99.)

But guilty complicity is what excludes the plaintiff, and, hence, one may doubtless sue for breach of promise, if ignorant, at the time of the engagement, that the defendant was already married. In Tennessee, this reservation has been indulged to a grave latitude. A married man courted a young woman, who supposed him single, offering himself by letter. She accepted in form; whereupon he confided to her at once, in his next epistle, that he had a wife then living, from whom he expected to procure a divorce, on getting certain papers passed. Instead of repudiating the contract, inquiring into the affair for herself, or keeping in reserve, as a woman should, she encouraged his love, pressing him fervently to hurry up those papers. He could not procure the divorce, because he had no grounds for one, and then she sued him for his breach of promise. The plaintiff was an intelligent and well-educated person. And yet it was held that, not being *in pari delicto*, she could maintain her action upon the offer she had accepted while supposing him single, and that her subsequent knowledge of his marriage could only be set up in diminution of damages.

No action can be maintained for breach of a promise of marriage, made in consideration of illicit sexual intercourse between the parties.

On the whole, we may question whether this right to sue for breach of promise of marriage is not productive of more evil than good. It is admitted that only one sex makes practical use of such a remedy, though its logical appli-

cation should be mutual; and of that sex, moreover, but few of the finer-grained. It is admitted, too, that the marriage state ought not to be lightly entered into; that it involves the profoundest interests of human life, transmitting its complex influences direct to posterity, and invading the happiness of parents and near kindred; that the step, once taken, is well nigh irrevocable. From such a standpoint, we view the marriage engagement as a period of probation, so to speak, for both parties—their opportunity for finding one another out; and if that probation results in developing incompatibility of tastes and temperament, coldness, suspicion, an incurable repugnance of one to the other, though all this may impute no vice to either, nor afford matter for judicial demonstration, duty requires that the match be broken off. What, then, shall be the consequence to the party who takes the initiative? Analyze our reported breach of promise cases, and you will see that the fair plaintiff is frail on the point most essential to womanly self-respect, in the majority of instances: that she has unwisely granted to her lover the indulgences of a husband, or that she was a soiled dove when he offered himself, or, more brazen still, that she had been loose with other men, while plighted in affection. That the man's virtue, in such cases, will usually bear comparison, we need not contend, since, in practice, it is not he that invites litigation. In the interests of morality, then, and for the sake of compensating the innocent few, who complete this record, and whose vows, moreover, were made in a befitting spirit, should so much festering corruption be yearly exposed to a jesting community, under the misnomer of a blighted affection? Are the fallen victims to passion to represent the victims of exalted love? Courts have found it necessary of late to insist, emphatically, that a man is not bound by a contract to marry a lewd woman, which he entered into in ignorance of her character. This stricture, however, by no means debars all the lewd women from suing for breach of promise, nor even all the impatient. And, however honorably one may have acquitted himself of an imprudent engagement, before its consummation, the right which is conceded him by law, of showing a justification by way of mitigating damages, does not cover the case; for, letting alone the difficulty of

proof, most men would rather pay hush-money than have the whole story of a love-folly trumpeted in the newspapers.

Seduction furnishes another and, properly speaking, quite a distinct case from the loss of a marriage opportunity. For this offence, so revolting to every instinct of manly honor, a moral and physical wrong renders it proper that the victim should have some right of action. But, instead of taking seduction as the time-honored appendage to breach of promise, and other collateral suits, it seems fitter, as some of our States now provide by law, to make seduction a distinct and independent ground for action. Where, too, a man, whether under promise to marry or not, gets a woman with child, she should have some sort of legal recourse, for the child's sake, if not her own. In this latter case, and, indeed, in the former, a criminal magistrate will feel that the law does its best, when, by a judicious exercise of influence, he can prevail upon the guilty pair to unite in marriage; for thus the lesser scandal is permitted, in order to avoid the greater.—*James Schouler in Southern Law Review.*

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, NOV. 30, 1880.

RAINVILLE, PAPINEAU, LAFRAMBOISE, JJ.

DUPUY v. McCLANAGHAN.

[From S. C., Montreal.

Rent paid in advance—Rights of hypothecary creditor.

A tenant, who in good faith has paid rent in advance to the proprietor, his lessor, cannot be compelled to pay the rent a second time in the event of the insolvency of the lessor before the expiration of the term so paid for in advance, and the proceeds of the property being insufficient to pay the hypothecary creditor in full.

The judgment inscribed in Review was rendered by the Superior Court, Montreal, Jetté, J., June 30, 1880. (See 3 Legal News, p. 340).

The judgment in Review was as follows:—

“La cour...

“Considérant que le loyer réclamé par le demandeur pour le bénéfice des dits créanciers appartenait aux créanciers chirographaires et à la masse de la faillite;

"Considérant que le failli avait le droit de se faire payer le dit loyer d'avance, au moins jusqu'à la date de la vente de l'immeuble par le syndic, et que tel paiement liait les créanciers du dit failli, à moins qu'il n'y eût fraude ;

"Considérant que les créanciers hypothécaires n'ont aucun privilège sur les loyers perçus par le syndic jusqu'à la vente ;

"Considérant qu'il y a erreur dans le dit jugement du 30 de juin 1880, infirme et annule le dit jugement, et procédant à rendre celui qu'aurait dû rendre la dite cour en cette instance, maintient l'exception du défendeur, et déboute le demandeur es qualité de son action, avec dépens," etc.

Judgment reversed.

Abbott, Tait, Witherspoon & Abbott, for plaintiff.
Doherty & Doherty, for defendant.

COURT OF REVIEW.

MONTREAL, April 29, 1881.

TORRANCE, PAPINEAU, JETTE, JJ.

(From S.C., Montreal.

CORREIL et al. v. CHARBONNEAU et vir, and MARTINEAU et al., T.S.

Saisie-arrest before judgment—Immoveable—
C. C. P. 834.

The immoveables of the debtor cannot be legally seized under a writ of saisie-arrest before judgment.

The judgments inscribed in Review were two: one rendered by the Superior Court, Rainville, J., Nov. 19, 1880 (see 3 Legal News, p. 381), and the second rendered by the same Court, Johnson, J., Jan. 31, 1881 (see 4 Legal News, p. 60).

The judgment in Review was as follows :—

"La cour, etc. . . .

"Considérant qu'en pratique la saisie avant jugement des immeubles réels n'a jamais été en usage dans la jurisprudence française telle qu'introduite et suivi dans cette province ;

"Considérant de plus que la loi statutaire et le code de procédure civile n'ont pas autorisé la saisie avant jugement des immeubles réels dans cette province ;

"Considérant par conséquent qu'il y a erreur dans les sus-dits jugements du 19 de Novembre 1880, et du 31 de janvier 1881, en autant qu'ils ont rejeté la requête de la défenderesse demandant la nullité de la saisie faite de l'immeuble

en cette instance ; casse et annule les dits deux jugements, et procédant à rendre le jugement que la dite cour supérieure aurait dû rendre sur ce point, maintient la dite requête de la défenderesse en autant qu'elle demande la nullité de la saisie du dit immeuble, et déclare en conséquence la saisie avant jugement du dit immeuble pratiquée en cette cause nulle et de nul effet, et en donne mainlevée à la défenderesse, avec les dépens de la dite requête devant la cour supérieure et les dépens de la présente révision contre les demandeurs contestants," etc.

Judgment reversed.

Dalbec, for the plaintiffs.

Loranger, Loranger & Beaudin, for the defendants.

COURT OF REVIEW.

MONTREAL, April 29, 1881.

SICOTTE, J., RAINVILLE, J., BUCHANAN, J.

GAGNON v. LALONDE.

Interlocutory Judgment—Review.

A judgment on a petition to be appointed judicial guardian is not susceptible of revision.

The judgment in Review was as follows :—

"La Cour. . . .

"Considérant que le jugement dont on demande la révision est un jugement interlocutoire rendu sur une requête faite pour obtenir que le défendeur soit nommé gardien judiciaire des biens saisis suivant l'art. 204 du C.C. et 987 du Code de procédure, et que d'après l'article 494, tel qu'amendé par les différents actes de la législature de Québec, il n'y a pas révision de tel jugement : cette cour renvoie l'inscription en cette cause, chaque partie payant ses frais en autant qu'il s'agit d'une action en séparation de corps et de biens.

Loranger & Co. for plaintiff.

A. Mathieu for defendant.

COURT OF QUEEN'S BENCH.

MONTREAL, Feb. 26, 1881.

DORION, C. J., MONK, RAMSAY, CROSS and BABY, JJ.

THE MUNICIPALITY OF CLEVELAND et al. (plffs. below), Appellants, and THE MUNICIPALITY OF MELBOURNE and BROMPTON GORE, (intervenants below), Respondents.

Toll bridge—32 Vict. c. 15, (Quebec).

An Act of the Local Legislature authorizing the Lieutenant-Governor to forfeit the right of exacting tolls on a toll bridge, (for default to make repairs), and to transfer the property to others, is not ultra vires.

The action was brought in the Court below by the appellants, three corporations, viz., the municipality of the township of Cleveland, the municipality of the village of Richmond, and the municipality of the village of Melbourne, against one Holmes, their tenant, and his sureties, for \$144.16, being one month's rent of the tolls and toll house of the toll bridge across the St. Francis River, between the villages of Richmond and Melbourne.

The respondents, the Township of Melbourne and Brompton Gore, intervened, claiming to be owners of one undivided half interest in the bridge, and they put in issue the appellants' title and possession of the bridge in question. The bridge had been granted to the municipalities of Melbourne and Cleveland, but subsequently requiring repairs, the grant was revoked by the provincial executive, and a grant made to the appellants, who undertook to make the necessary repairs. The Court below, (Circuit Court, St. Francis, Doherty, J.) maintained the intervention, on the ground that the order in Council was *ultra vires*.

RAMSAY, J. The first question that is raised on this appeal, is as to the nature of the title conveyed by the order in Council, of the 21st November, 1857, to the then municipal Councils of the townships of Cleveland and Melbourne, as then constituted, *auteurs* of the parties now appellants and respondents.

On reference to the sections of the statute, under the authority of which this order in Council was passed, (12 Vic., cap. 5, sects. 12 and 13), it appears evident that the government of the then Province of Canada had full power to alienate completely, and without any restriction whatever, in favour of any district or municipal Council, or other local authority or company, any public roads, harbors, bridges or public buildings. The words of the statute are "to grant (and by so granting to transfer and convey)." The crown could of course limit the estate so conveyed, but whatever right was so conveyed became the property of the grantee, and this grant could not be revoked without the consent of the grantee "attested by

signature or seal, or both, as would be sufficient to make any deed or agreement, the deed or agreement of such grantees." (Sec. 13.)

In the order of Council, granting this bridge to the councils of the townships of Cleveland and Melbourne, it does not appear that there was any right reserved by the Provincial government to revoke this particular grant, and indeed no such pretension is put forth. It was, however, contended at the argument that the crown had a right to take any property for public uses; that it had, therefore, the right to resume the possession of this bridge without process of law, and that the local government, inheriting this right, might enter upon any property and take possession of it, of its own authority. The Court disposed of this proposition at the argument, and it is unnecessary to refer to it again.

The question in dispute between the parties really turns on the action of the local government of Quebec, under the terms of the 32 Vic., c. 15, Sec. 190.

By that act it is provided that the commissioner of public works, may make or cause to be made a report of the state of any toll bridge, and he may on any such report, order the bridge to be repaired within a certain time, and if it be not so repaired, then the proprietor of the bridge shall forfeit the right of exacting tolls, for passage on the bridge and all other privileges conferred upon him by the act respecting such bridge. Then sub-section 5 continues that "from the day of the publication of such proclamation, the bridge mentioned therein shall become the property of the Province, and the Lieutenant-Governor in Council may transfer the property therein and the control thereof, either to the municipality in which the same is situate, or to any other neighboring municipality, together with all the rights and privileges which the former proprietor thereof enjoyed, and upon such transferee becoming bound to perform upon such bridge the work ordered by the commissioner, and to keep the same for the future in good repair."

It is contended by respondents that this Act only applies to toll-bridges forming part of the public works of the Province, that a local Act cannot deprive a person of his property without process of law, and that this Act cannot affect the bridge in question, as it falls under the control of the Dominion Parliament. The legisla-

tion in question is perhaps of very questionable policy, but it is not the province of the courts to guide the policy of the legislature. They may consider the reason of a law to interpret its doubtful provisions, or to give effect to the manifest intentions of the legislator, but they have no right to suspend the operation of an act clearly expressed.

In this case I cannot think there is any ambiguity in the language of the statute. It applies to "any toll-bridge," and it specially refers to toll-bridges the property of which is not vested in the government of the province. In sub-section 3, we find that by proclamation the bridge may be declared to be closed, "and the proprietor thereof to have forfeited the privilege of exacting tolls for passage over the same, together with all other privileges conferred upon him by the act respecting such bridge." And again in sub-section 5, we have it enacted that "From the day of the publication of such proclamation, the bridge mentioned therein shall become the *property* of the Province," etc. It was not then a public work in the sense of a Provincial work, before that. It was treated of as a public work because it was a work the owner of which had special privileges, because of its being a work for the public use.

I don't think any legislature has the *right* to deprive a person of his property, but by the theory of the constitution it has the *power*. In a word, it is assumed that the legislature is the judge of the morality of its own legislation.

It seems to me that this bridge and the rights conveyed by the order in council are "property in the Province," in fact it is the starting point of the respondents' argument, that the statute is an interference with vested rights of property. Again it is property held by a municipal institution in the Province. Further it is a matter of a merely local nature. And lastly, I don't see anything in the enumeration of the legislative powers of Parliament to except the toll-bridges belonging to municipalities from the control of the local legislatures.

A technical point was raised by appellants that the grant was to the councils of the municipalities of Cleveland and Melbourne, and that the intervening parties have no interest in the contest, that even if they represent the municipality of the township of Melbourne they don't represent the council. There is nothing in that.

The grant to the council was in compliance with the terms of the 12 Vic., and it was a grant to the council which only existed as the agent or representative of the municipality.

The judgment is reversed.

The judgment in appeal is as follows:

"The court, etc.

"Considering that under the provisions of the statute of the Province of Quebec, of the 32nd year of the Queen's reign, ch. 15, it is in effect provided that the commissioner of public works may make or cause to be made a report of the state of any toll-bridge, and that he may, on any such report, order the bridge to be repaired within a certain time, and if it be not so repaired, then the proprietor of the bridge shall forfeit the right of exacting tolls for passage on the bridge, and all other privileges conferred upon him by the act respecting such bridge. And whereas it is further provided by the said act that, 'from the day of the publication of such proclamation, the bridge mentioned therein shall become the property of the Province, and the Lieutenant-Governor in council may transfer the property therein, and the control thereof, either to the municipality in which the same is situate, or to any other neighboring municipality, together with all the rights and privileges which the former proprietor thereof enjoyed, upon such transferee becoming bound to perform upon such bridge the work ordered by the commissioners, and to keep the same for the future in good repair.'

"Considering that the action in this cause refers to a toll-bridge, within the Province of Quebec;

"Considering that the Lieutenant-Governor of the Province of Quebec in Council has, by the authority conferred on him by the said statute transferred the property of the said bridge and the control thereof to the appellants;

"Considering that the said act only affects property and civil rights in the Province of Quebec;

"Considering that there is error in the judgment rendered by the Circuit Court sitting at Sherbrooke in the district of St. Francis, on the 13th of December, 1879, doth set aside the said judgment, and proceeding to render the judgment which the said Circuit Court should have rendered, doth dismiss the intervention of the said respondents with costs

on the intervention in Court below, and costs of this appeal."

Judgment reversed.

Ives, Brown & Merry for appellants.

Hall, White & Panneton for respondents.

RECENT DECISIONS AT QUEBEC.

Justices of the Peace—Jurisdiction.—Le plaignant poursuit les défendeurs pour avoir illégalement et malicieusement coupé du bois sur sa propriété, et en contravention aux dispositions de la sect. 26 du statut 32-33 Vic., ch. 22. Les défendeurs plaident non-coupables, ajoutant que comme membres de la tribu des Hurons dont forme aussi partie le plaignant, ils ont droit de couper du bois sur la propriété de ce dernier. Ils ne produisent aucun titre qui mentionne ce droit ou qui y réfère en aucune manière.

Jugé.—Que ce tribunal (Sessions de la Paix), a droit d'entrer dans la preuve de propriété pour s'enquérir si la défense est faite *bona fide*.—*Picard v. GrosLouis et al.*, (Chauveau, J. S. P.) 7 Q.L.R. 131.

Saisie-Arrêt—Jurisdiction—Contestation of declaration of tiers-saisi.—La contestation de la déclaration du tiers-saisi est une instance séparée et distincte de celle sur laquelle a été prononcé le jugement que la saisie-arrêt exécute, et lorsque cette contestation demande contre le tiers-saisi une condamnation au paiement d'une somme dont le montant, formé du capital, des intérêts et des frais dus au saisissant, excède la juridiction de la Cour de Circuit, elle doit être renvoyée à la Cour Supérieure.—*Wright v. Corp. de Stoneham et Tewkesbury*, et *McKee*, T. S., (S. C., Casault, J.), 7 Q.L.R. 133.

Officers of Courts of Justice—Litigious debt—Nullity.—1. La défense que fait l'art. 1485 C.C. aux officiers attachés aux tribunaux, d'acquiescer des droits litigieux qui sont de la compétence du tribunal dans le ressort duquel ils exercent leurs fonctions, est d'ordre public, et crée une nullité qui doit être proposée, mais qui n'a pas besoin d'être demandée par des conclusions spéciales.—*Côté v. Haughey*, (Court of Review), 7 Q.L.R. 142.

2. L'achat d'une dette qui a été payée mais dont il n'y a pas de quittance est, pour l'acquéreur qui a été informé du paiement, celui d'une dette litigieuse.—*Id.*

3. La preuve testimoniale du paiement, quoiqu'insuffisante pour établir l'extinction d'une

dette excédant \$50, suffit pour en déterminer le caractère litigieux.—*Id.*

Registration—Seizure.—The seizure of real estate does not prevent the effectual registration of a deed executed before the seizure.—*Drouin v. Hallé & Langlois*, opposant, (Superior Court, Meredith, C. J.), 7 Q.L.R. 146.

Legacy, Revocation of—Reddition de compte—Curator.—The testator by his will in 1833, bequeathed to some of his children certain seigniories. Out of the proceeds he paid his debts, and invested the balance.

Held, 1. That under the old law the sale by the testator of the seigniories which were the subject of the legacy in question in this cause, had not, considering the circumstances under which it was made, the effect of defeating that legacy.

2. That the curator to a vacant estate sued *en reddition de compte* could not, under the circumstances, pray for the dismissal of the plaintiff's action on the ground that another similar case, still pending, had been previously instituted against him by another of the interested parties.—*Fraser v. Pouliot et al.*, (Superior Court, Meredith, C. J.), 7 Q.L.R. 149.

RECENT UNITED STATES DECISIONS.

Fire policy.—Notice of loss.—Waiver.—1. Notice to the local agent of a fire company by whom the insurance was effected, in a few days after such loss, and by him communicated immediately to the company, satisfies the requirement of the policy that persons sustaining loss should "forthwith" give notice thereof to the company. (2) Where, shortly after the fire, the adjuster of the company visits the scene of the casualty, inspects the premises and makes a (declined) offer of compromise, and afterward the company furnishes to the assured blank proofs of loss, which are filled up in the presence of its officers, it is not error to leave it to the jury to infer, in the exercise of their best judgment, a waiver of strict proof of loss. *Collins v. Ins. Co.*, and *Willis v. Ins. Co.*, 79 N. C. 279, 285, cited and approved. (*North Carolina Sup. Ct.*, Jan. 1881.) *Argall v. Old North Star Ins. Co.*, 84 N. C., 355.

False pretence.—What necessary to constitute.—To sustain an indictment under the statute for obtaining goods by false pretence, there must be a false representation of a subsisting fact, etc. *State v. Phifer*, 65 N. C. 321. The statement of an opinion, even if false, will not sustain such an indictment. To say that the eyes of a horse are sound is merely the expression of an opinion, but to say "that there never has been anything the matter with the eyes of the horse," is the statement of a fact, which if false is within the statute and indictable. *North Carolina Sup. Ct.*, January, 1881. *State of North Carolina v. Hifner*. (84 N. C. 751.)

The Legal News.

VOL. IV. SEPTEMBER 3, 1881. No. 36.

THE LEGAL VACATION.

The brief annual holiday, misnamed the "Long Vacation," accorded to the legal profession in Canada, has come to a close. In Ontario, Trinity Term began August 22, and in the Province of Quebec, the Courts resumed their usual work on the 1st instant. We see, by some of our United States contemporaries, that in the larger American cities there is a growing disposition to make the most of the brief respite afforded by the summer vacation from exhausting toil, and lawyers of eminence, at any sacrifice, desert their offices for a plunge into the mountains, or other secluded spots, where only, at a distance from telegraph and telephone, they may obtain the change and the rest which are so essential to build up the energy impaired by long months of continuous exertion. In England the "Long Vacation" means something more than a few weeks' suspension of active work, and English barristers probably owe a good deal to their lengthened opportunity for physical and mental recreation.

In Canada the first of September usually brings the temperate weather conducive to comfortable activity, but this year has been an exception. The vacation came to a close in a torrid temperature, and, in the cities, with its usual accompaniment, fetid odors, and a debilitating atmosphere. We have the certainty, however, that summer heats must speedily pass away, and the Courts will resume their usual aspect. We trust that our readers have all enjoyed to the full the season of relaxation, and we take the opportunity of the beginning of another legal year, to invite in a larger measure their co-operation and support. To the judiciary we are already indebted for much valuable assistance; and the profession is equally indebted to them, for, without such aid, a work of this kind could probably not be sustained at all. We think, however, that our readers, especially in the country districts, have it in their power to add considerably to the interest of their weekly visitor, by contributing brief memoranda of the decisions

in those cases on which they have bestowed the most labor, and in which they have taken the deepest interest. For all such assistance we shall be grateful.

UNPROFESSIONAL PUFFING.

The profession in the Province of Quebec are probably aware of indirect advertising indulged in to some extent by certain irrepressible members, but we think we may claim to be free from the indecent quackery which unfortunately appears to be too common in some districts of the sister Province of Ontario. One "barrister" announces in the public journals that he "will continue his law, loan, and insurance practice with good assistants." Another professional gentleman proclaims the curious combination "Dry Goods, Groceries, Commissioner and Conveyancer, Real Estate Agent, Boots and Shoes." "Conveyancing" seems to be a favorite ground for poachers of all denominations, but even a licensed solicitor has informed the public by advertisement that he will do work of this description at half the usual prices "for cash".

Our bar associations are often treated with ridicule, and the bulwarks against unprofessional conduct are regarded as contemptible. We are not among those who attribute to them undue excellence or importance; but at least we do not suffer by comparison with some features of outside customs.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, June 30, 1881.

DORION, C. J., MONK, RAMSAY, TESSIER, CROSS, J.J.
NICHOLSON (def. below), Appellant, and METRAS
(plff. below), Respondent.

Evidence—Appeal where case turns upon evidence which is contradictory.

The appeal was from a judgment of the Court of Review, Montreal, Sept. 30, 1879, (Rainville, Papineau, Jetté, J.J.) which reversed a judgment of the Superior Court, Montreal Feb. 28, 1879, (Mackay, J.)

In appeal the judgment in revision was reversed, and the original judgment restored.

RAMSAY, J. This is an appeal from a decision of the Court of Review, reversing the judgment of the court of first instance. The action was by appellant for the price of a milk waggon. The contract was verbal, and appellant's defence is that the waggon tendered is not suitable for the purpose for which it was ordered nor conformable to the order given. The evidence is very contradictory. Plaintiff tries to prove his case by his work-people, who heard from the shop what passed between the parties. Their evidence is contradicted by relatives of the defendant. It seems to me that if there had been nothing further the action should have been dismissed, for it was for the plaintiff to prove his case. But in addition to this we have a fact about which there is no difficulty, and which seems to be decisive. The waggon was to be made like one belonging to a person called McGee, and the plaintiff actually measured McGee's waggon; but the new waggon is not like McGee's. The places for the milk cans are wrong, the axles are too wide, and the wheels won't turn under. It is with great regret that we reverse a judgment on a matter of evidence. Usually we do not do so when either view of the evidence may, in our opinion, be fairly maintained, even although we might incline to a view different from that taken. I desire particularly not to be misunderstood in saying this, for I am perfectly aware that the rule we follow has been subjected to some misconception in different quarters. We do not say that we look upon the decision of the court below as we should on the finding of a verdict by a jury, for that would be a manifest error as to our law. On the contrary we are obliged to examine and appreciate the proof; but we do not readily reverse on mere appreciation of the evidence. It appears to me that however difficult it may be to express this rule, its application offers no practical difficulty. In this case, however, we have not to consider this rule. We have only to decide between two judgments, and we think that the judgment in the first instance was correct, and that it should not have been touched. The judgment in review will, therefore, be reversed with costs.

Judgment reversed.

Maclaren & Leet, for appellant.

Coursol, Girouard, Wurtelle & Szeaton for respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, Jan. 26, 1881.

DORION, C. J., MONK, CROSS, BABY, JJ.

BLACK et al. (plffs. below), Appellants, and STODDART (intervenant below), Respondent.

Procedure—Injunction.

Where an injunction is issued in a case which does not fall within any of the cases provided for by the Injunction Act of 1878, (41 Vic. [Quebec] c. 14), the delay prescribed for ordinary suits must be allowed between service and return.

The appeal was from a judgment of the Superior Court, Montreal, May 31, 1880, (Papineau, J.) quashing an injunction.

The injunction had been asked to restrain one Hood, of the city of Montreal, from publishing in Canada certain books, containing articles prepared for the Encyclopedia Britannica, the latter work having been registered by the appellants under the Copyright Act of 1878.

After the return of the writ, the respondent petitioned to be allowed to intervene as being interested in the publication, and the respondent, by a preliminary exception, then attacked the regularity of the proceedings, alleging that the ordinary delays should be followed, whereas in the present case the writ had been served only four days before the return day.

The COURT, affirming the decision of the court below, held that as the case did not fall within any of the cases provided for by the Act of 1878 (41 Vic. cap. 14), the proceedings were irregular, and the respondent had a right to take advantage of the irregularity by a preliminary plea.

Judgment confirmed.

Archibald & McCormick, for appellants.

Kerr, Carter & McGibbon, for respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, June 30, 1881.

DORION, MONK, RAMSAY, CROSS, BABY JJ.

CAFFREY (def. below), Appellant, and LIGHT-HALL (plff. below), Respondent.

Capias—Affidavit.

An affidavit for capias, which sets out merely the intended departure of defendant without paying his debt to plaintiff, is insufficient.

Appeal from a judgment of the Superior Court, Montreal, Jan. 31, 1879.

RAMSAY, J. The affidavit in this case sets out no fact beyond the departure of defendant, and his failure to pay what he owes. It has now been so often laid down that this is not sufficient that the jurisprudence must be considered settled on the point. How a departure is to become "with intent to defraud" otherwise than by the non payment of the debtor's liability, it is not easy to understand, but the law would cease to be interesting if it had not its little mysteries. I take it, however, that the recent rulings have completely annihilated "the seafaring man" doctrine.

The judgment is as follows:—

"The Court, etc.

"Considering that the affidavit of the respondent in this cause contains no sufficient statement of the reasons of the deponent's belief that the appellant was about to leave immediately the Province of ———, to wit, the heretofore Province of ———, with intent to defraud his creditors in general, or the said respondent in particular;

"And considering therefore, that there was no sufficient ground stated in the said affidavit as required by law to justify the issue of a *capias ad respondendum* in this cause;

"And considering that there is error," &c.

Judgment reversed.

Carter, Church & Chapleau, for appellant.

D. Macmaster, for respondent.

COURT OF REVIEW.

MONTREAL, April 29, 1881.

JOHNSON, RAINVILLE, PAPINEAU, J J.

CORSE et vir v. DRUMMOND es qual, and DRUMMOND, opposant.

Succession—Ascendant—Beneficiary heir.

The judgment of the Superior Court in this case, reported in 3 Legal News, p. 341, was unanimously confirmed.

Piché & Moffatt, for opposant.

Ritchie & Ritchie, for plaintiffs contesting.

SET-OFF BY STOCKHOLDER IN INSOLVENT BANK.

PENNSYLVANIA SUPREME COURT, MARCH 14, 1881.

MACUNGIE SAVINGS BANK V. BASTAIN.

A stockholder in an insolvent bank, who is also a depositor, cannot set off the amount of his deposit

against the amount due for unpaid assessments on the stock subscription.

Action to recover the amount of unpaid assessments upon a subscription for stock in the plaintiff bank.

The bank was incorporated in 1867, when defendant subscribed for one hundred shares of its stock. The par value of each share was \$20, but defendant only paid \$5 per share. In 1878 the bank made an assignment for creditors. The assets were not sufficient to pay the debts and an assessment of \$15 per share was made on the stockholders. In this action defendant set up that he had deposited in the bank \$4,425 which he claimed to set off against his liability on his stock subscription. The court below held that he was entitled to the set-off. To review such decision plaintiff took a writ of error.

STERRETT, J. The capital stock of a corporation, whether fully paid or partly outstanding in the hands of subscribers thereto, is undoubtedly a trust fund for the benefit of its creditors. *Germantown Railway Co. v. Fuller*, 16 P. F. Smith, 131; *Woods v. Dummer*, 3 Mason, 308; *Mann v. Pentz*, 3 Comst. 422. While such unpaid subscriptions pass, as assets, to the assignee under a voluntary assignment for the benefit of creditors, and the directors of the insolvent corporation may be required to make such calls on subscribers to the stock as may be necessary to enable him to collect the same, they still retain the impress of trust funds and must go into the hands of the assignee intact, for the purpose of distribution among those for whose benefit they were intended. In this respect they differ from ordinary choses in action belonging to the assignor at the date of assignment. Against the latter, legitimate claims of set-off may exist, and what remains after deducting the same is all that can properly be considered a part of the trust fund.

The demand against defendant in this case is not grounded on business transactions between him and the bank since its organization. It originated in the very creation of the bank, of which he was one of the corporators. As a condition precedent to the granting of letters of incorporation, they were required by the sixth section of the charter "to raise and form a capital of not less than five nor more than fifty thousand dollars, in shares of twenty

dollars each" for the security of depositors. The defendant subscribed for one hundred shares of the capital stock thus required and paid twenty-five per cent thereof. By resolution of the board, after the assignment, the remaining seventy-five per cent was "called in for liquidation of the indebtedness of the corporation." He refused to pay in obedience to the call, and when suit was brought by the assignee in the name of the bank, to recover the balance due and owing by him on his subscription, his defence was that the bank was indebted to him as a depositor in a much larger sum, and therefore he should not be compelled to pay.

If such a defence were entertained, the effect would be to withdraw from depositors and other creditors of the insolvent bank a portion of the very fund which was specially provided for the common benefit of all alike, and apply it to the sole benefit of the defendant, who, at best, has no better right thereto than other depositors. If every delinquent subscriber to the capital stock could thus pay his subscription, what would become of other depositors and creditors of the insolvent bank? It is not difficult to see what a perversion it would be of the trust fund, and to what gross injustice it would necessarily lead. From the fact that the directors called in the whole of the outstanding subscriptions for the purpose of liquidating the indebtedness of the bank, we have a right to assume that it is all required for that purpose. If defendant's indebtedness to the bank at the date of the assignment had been founded on an ordinary business transaction, such as making or endorsing a note, he might with some show of reason insist on setting up by way of defence a counter-claim as depositor. This would bring him within the principle of *Jordan v. Sharlock*, 3 Norris, 368.

In *Sawyer v. Hoag, Assignee*, 17 Wall. 610, it is held that a stockholder indebted to an insolvent corporation for unpaid shares cannot set off against this trust fund for creditors a debt due him by the corporation; that the fund arising from such unpaid shares must be equally divided among all creditors. That case, it is true, arose under the National Bankrupt Act; but so far as the principle now under consideration is concerned, the right to set-off and rule of distribution, under that act, do not

materially differ from our voluntary assignment law.

The defence set up in this case derives no support from the principle involved in *Fox's Appeal*, 8 Week. Notes, 556. The fund for distribution there included proceeds of outstanding subscriptions to capital stock of the Kutztown Savings Bank, which had been collected by the assignee. The whole fund was insufficient to pay depositors, who claimed that as a preferred class they were entitled to the fund for distribution to the exclusion of other creditors, and if not entitled to the entire fund, they had at least an exclusive right to that portion of it which represented capital, collected by the assignee; but it was held that the depositors as a class had no exclusive right to the whole or any particular portion of the fund.

As the case was presented to the court below, we are of opinion that the plaintiff was entitled to judgment for want of a sufficient affidavit of defence.

It is ordered that the record be remitted to the court below with instructions to enter judgment against the defendant for fifteen hundred dollars with interest from the time the same was due and payable according to the call, unless other legal or equitable cause be shown to said court why such judgment should not be so entered.

PAYMENT UNDER COMPULSION.

SUPREME COURT OF WISCONSIN.

PARCHER V. MARATHON COUNTY.

Where payment is made under compulsion of legal process, accompanied by protest that the demand is illegal and the party paying will take measures to recover it back, it is not a voluntary payment.

To constitute compulsion of legal process, actual seizure or threat to seize property by virtue of the process is not necessary; it is sufficient if the officer demands payment by virtue of the process and manifests an intention to enforce collection by seizure and sale of property.

The action was brought to recover back the amount of a tax assessed upon the personal property of the plaintiffs in the year 1877, in the city of Wausau, which the plaintiffs allege they paid by compulsion and under protest. It was admitted on the trial by the defendant county that the tax was illegal. It appears that the treasurer of Wausau demanded the

amount of such tax of the plaintiffs, who refused to pay it on the ground that it was illegal and void. The city treasurer returned the tax as delinquent to the county treasurer of Marathon county, who afterwards issued his warrant to the sheriff to collect the same pursuant to the statute. It is alleged in the complaint that "the said sheriff did present said warrant for the collection of said personal property tax, for the year 1877, to these plaintiffs, and demanded payment thereon, but that these plaintiffs refused to pay the same for the reason that the same was illegal and void; that said sheriff threatened to levy upon the personal property of these plaintiffs, and advertise and sell the same to satisfy said personal property tax. Whereupon, to save said personal property from sale, and under compulsion and protest, they paid the sheriff the amount of said tax, together with interest and his costs, and took his receipt therefor, but that they notified said sheriff that they considered said tax illegal and void, and that they should attempt to recover the same." And, further, that the sheriff paid the amount of the taxes so paid by them into the county treasury for the use of the county. The substance of the answer is that the plaintiffs, with full knowledge of all the facts which invalidated the tax levy, voluntarily paid the sheriff the amount of taxes so assessed against them. A trial of the action resulted in a verdict for the defendant. The plaintiffs appeal from the judgment against them entered pursuant to the verdict. The case is further stated in the opinion.

LYON, J.—It is not denied that the complaint states a cause of action. The testimony given on the trial tended to prove all the material averments in the complaint, and was undoubtedly sufficient to support a verdict for the plaintiffs had the jury found for them. The only question litigated on the trial was whether or not the plaintiffs paid the illegal tax voluntarily. On this question, after submitting to the jury the question whether the payment was made by them with the view of preventing a levy upon and seizure of their goods, with an instruction that if made for that purpose the plaintiffs should recover, the learned circuit judge further instructed the jury as follows: "It is not enough that an officer gets a warrant in his hand and notifies all tax payers, 'The amount of this tax must be paid or I will enforce the

collection by levy.' That is not enough. It must be a present purpose, an intent, of levying,—of taking the goods then and there; not that he will do so in the course of some future days, but that he intends to levy, and having that intention and purpose, and warrant of authority to do it, and the party pays to prevent his goods being seized,—if he does it under such circumstances, it is compulsory payment. If it is not under such circumstances, it is what the law calls a voluntary payment. However the man may squirm about the tax it is called a voluntary payment, and he cannot recover it back. A threat to levy, to levy now at the time, and with the purpose to take the goods then and there, and if the money is paid then and there to prevent the act, it is what is meant by compulsory payment in the law, and a person who pays that way, the tax being illegal, can recover it back; not otherwise."

In *Van Buren v. Downing*, 41 Wis. 122, this court had occasion to consider the question of the liability of an officer or agent to refund an illegal tax or duty collected by him paid over to his principal. The defendant in that case was an assistant treasury agent, and as such collected of the plaintiff a license fee imposed by a statute afterwards adjudged invalid, and paid the fee into the State treasury. The action was to recover back the sum so paid. Because the plaintiff did not pay the fee under protest, or deny his liability therefor, or notify the agent of his intention to bring suit to recover it back, we held the payment voluntary, and that the agent was not liable after he had paid the money into the treasury in good faith. The cases cited in the opinion abundantly show that the rule of the liability of officers or agents in such cases is correctly stated in *Erskine v. Van Arsdale*, 15 Wall. 75. That was an action against a collector of internal revenue to recover the amount of an illegal tax assessed against and paid by Van Arsdale. This is the rule laid down by the court: "Taxes illegally assessed and paid may always be recovered back if the collector understands from the payer that the taxes are regarded as illegal, and that suit will be instituted to compel the refunding of them." Judge Cooley, in his treatise on the Law of Taxation, says that "all payments of taxes are supposed to be voluntary which are not made under protest or under the apparent

compulsion of legal process," and that when a protest is relied upon, nothing very formal is requisite: Page 548. He also quotes approvingly the rule laid down by the Supreme Court of the United States in *Erskine v. Van Arsdale*, *supra*.

Such is the rule in an action against the officer or agent to whom the money was paid in the first instance. Certainly no stronger rule prevails in favor of the principal after the money has been paid over by such officer or agent. Indeed, there are authorities to the effect that the rule is more favorable to the plaintiff in the latter case, than when the action is against the officer or agent. This distinction is mentioned in *Atwell v. Zeluff*, 26 Mich. 118. We need not discuss this distinction. We prefer to consider this case on the theory that to entitle the plaintiff to recover against the county he must make as strong a case as he would be required to make were his action against the sheriff. *Atwell v. Zeluff*, is an instructive case on the general question of what are and what are not voluntary payments. The rule is there stated as follows: "Where an officer demands a sum of money under a warrant directing him to enforce it, the party of whom he demands it may fairly assume that if he seeks to act under the process at all he will make it effectual. The demand itself is equivalent to a service of the writ on the person. Any payment is to be regarded as involuntary which is made under a claim involving the use of force, as an alternative, as the party of whom it is demanded cannot be compelled or expected to await actual force, and cannot be held to expect that an officer will desist after once making demand. The exhibition of a warrant directing forcible proceedings, and the receipt of money thereon, will be in such case equivalent to actual compulsion." We do not say that we would assent to that rule as broadly as there stated. Perhaps a protest, at least, should be required, especially if the action be brought against the officer or agent after he has paid over to his principal the money illegally collected. The opinion in the Michigan case recognizes the hardship of the rule, and suggests a modification of it by the Legislature.

But whether the rule of the Michigan case is or is not correct, we think it must be held, on principle and authority, that the payment

of a demand, under compulsion of legal process, such payment being accompanied by a protest that the demand is illegal, and that the payer intends to take measures to recover back the money paid, is not a voluntary payment. And, further, to constitute compulsion of legal process it is not essential that the officer has seized, or is immediately about to seize, the property of the payer by virtue of his process. It is sufficient if the officer demands payment by virtue thereof, and manifests an intention to enforce collection by seizure and sale of the payer's property at any time. On the general question we are considering, numerous authorities are cited in *Cooley on Taxation*, in the notes on pages 568-571. The case of *Powell v. Sup'rs of St. Croix Co.* 46 Wis. 210, is an illustration of what constitutes a voluntary payment. It follows from the views above expressed, that when the learned circuit judge instructed the jury that unless when the tax was paid the sheriff had the present intention and purpose to seize the plaintiffs' goods then and there, the plaintiffs could not recover, and that an intention to seize at a future day was not sufficient, he laid down a limitation of the liability of the defendant which the law does not sanction.

For this error the judgment must be reversed, and the cause remanded for a new trial.—*Chicago Legal News*.

RESTRICTIVE COVENANTS—CONSTRUCTIVE NOTICE.

Cases on the question of constructive notice have now become very common, since it has become well established law that many restrictive covenants which would not at common law be binding on the purchasers of landed property, under the rules in *Spencer's case*, do bind the purchasers, according to the rules of equity, if they have had notice, actual or constructive, of the existence of such covenants. We have lately reported two cases bearing on the subject, the one, *Williams v. Williams*, 44 L. T. Rep. N. S. 573, having been heard by Mr. Justice Kay, and the other, *Patman v. Harland*, 44 L. T. Rep. N. S. 728, by the Master of the Rolls. The relief sought in the two actions was very different, but in both of them the case of *Jones v. Smith*, 1 Hare, 43; 1 Ph. 244,

was discussed and relied on, being followed in the first and distinguished in the second. That was a case where an intending mortgagee had inquired of the mortgagor and his wife whether any settlement had been made on their marriage, and was informed that a settlement had been made of the wife's property only, and that it did not include the husband's estate, which was proposed as the security. It was held by Vice-Chancellor Wigram, and on appeal by Lord Lyndhurst, that the mortgagee, having advanced his money *bona fide* in the belief that the settlement did not include the husband's estate, was not affected with notice of it. The action of *Williams v. Williams* was also one turning upon constructive notice of a marriage settlement, having been instituted for the purpose of rendering a solicitor liable as constructive trustee of the purchase-money of property which had been sold by him, but which was in fact subject to the settlement. It appeared that the husband, who was married in India but had subsequently settled in England, in giving instructions to the defendant for the preparation of his will, informed him that a settlement had been prepared, but stated that it had arrived at the place where the marriage took place after its celebration, and had therefore not been executed. After the testator's death, on the occasion of the sale, a telegram relating to the settlement was brought before the solicitor, but being confident that it had come to nothing, he instructed his clerk to reply in the negative to a question by the purchaser's solicitor as to whether there had been any settlement affecting the property. Mr. Justice Kay, whilst of opinion that the solicitor had been guilty of negligence, which made it proper that he should pay the costs of the suit, considered that the case fell within the rule in *Jones v. Smith*, and accordingly declined to make the solicitor a constructive trustee of the purchase-money for the beneficiaries under the settlement. In the case of *Patman v. Harland*, the purchaser of a portion of a building estate subject to certain covenants, amongst which was one restraining the erection of any building other than a private dwelling-house, built a dwelling-house upon it and then leased it to the defendant. The lease contained a special provision for the erection in the garden of a corrugated iron building, to be used as an art studio. On the

lessee commencing the erection of the studio, the plaintiff, the original vendor of the land, brought his action to restrain the defendant from proceeding. The Master of the Rolls held, on motion, that he was entitled to an injunction. The principal argument for the defendant was based on *Jones v. Smith*, it being contended that that case lays down a general rule to the effect that where the person, through whom the notice of a deed which may affect the title has been received, has at the same time led the purchaser to believe that the deed does not really affect it, the doctrine of constructive notice does not apply. But the Master of the Rolls in his judgment pointed out the wide difference between the cases where, as in the case before him, the deed forms a necessary part of the chain of title, and where, as in *Jones v. Smith*, it is only one which (to use the words of Lord Lyndhurst), "may or may not affect the title." In the latter case there is no duty on the part of the vendor to disclose the terms of the deed unless it really does affect the title, and he cannot be compelled to disclose them if he has replied in the negative to a question whether the deed affects the title or not. His Lordship therefore held that the lessee was not released from liability by the representations made by the lessor.—*London Law Times*.

RECENT ENGLISH DECISIONS.

Club—Rules governing interference of court with action of Club.—The rules of a club provided that in case the conduct of any member, either in or out of the club-house, should, in the opinion of the committee, or of any twenty members of the club who should certify the same in writing be injurious to the character and interests of the club, the committee should be empowered (if they deemed it expedient) to recommend such member to resign, and if the member so recommended should not comply within a month from the date of such communication being addressed to him, the committee should then call a general meeting, and if a majority of two-thirds of that meeting agreed by ballot to the expulsion of such member, his name should be erased from the list, and he should forfeit all right or claim upon the property of the club. D., a member of the club, sent a

pamphlet which reflected on the conduct of S., also a member of the club, to S. at his official address, such pamphlet being inclosed in a cover on which was printed "Dishonorable conduct of S." This being brought to the attention of the committee, they called upon D. to resign, being of opinion that his conduct was injurious to the character and interests of the club. D. not having resigned, a general meeting was duly called, at which the requisite majority voted in favor of his expulsion. On an action by D. to restrain the committee from excluding him from the club, *held*, that the court had no right to interfere with the decisions of clubs with regard to their members except in the following cases: first, if the decision arrived at was contrary to natural justice, such as the member complained of not having an opportunity of explaining his conduct; secondly, if the rules of the club had not been observed; thirdly, if the action of the club was malicious and not *bona fide*. The plaintiff having had an opportunity of explanation, the rules having been duly observed, and the action of the club having been exercised *bona fide* and without malice, the judgment of Jessel, M. R., dismissing the action (41 L. T. Rep. [N. S.] 490) was affirmed. *Semble*, that even if the decision of the club had been erroneous, but given *bona fide* and in accordance with the rules, the court would not have interfered. Cases cited, Labouchere v. Earl of Wharncliffe, 13 Ch. Div. 346; Induwick v. Snell, 2 Mac. & G. 216, 221. Ct. of App., Feb. 1, 1881. *Dawkins v. Antrobus*. Opinions by James, Brett and Cotton, L. JJ., 44 L. T. Rep. (N. S.) 557.

Will—Mutilation—Presumption of revocation.—Will found after death with signature and attestation clause cut off and folded inside the will. No other evidence of intention. *Held*, that this was a sufficient evidence of an *animus revocandi*. Bell v. Fothergill, L. R., 2 P. & D. 148, followed with reluctance. Probate, etc., Div., March 23, 1881. *Magnesi v. Hazelton*. Opinion by Sir Jas. Hannen, 44 L. T. Rep. (N. S.) 586.

Conditional Sale—Sale of horse on trial—Death of horse before trial.—The plaintiff sold a horse to the defendant upon a condition that the horse should be tried by the defendant for eight days, and returned by him at the end of that time if he did not

think it suitable for his purposes. The horse died within such eight days without fault of either party. *Held* (by Denman, J.), that there was no absolute sale at the time of the horse's death, and therefore that the plaintiff could not recover the price.—*Elphick v. Barnes*, 49 L. J. Rep. Q. B. 698.

Insurance—Fire Policy—Loss occasioned by the felonious act of the wife of the assured—Rights of the insurer.—An insurance company granted a fire policy to S., and during the currency of the policy S's wife feloniously burnt the property insured. The company, not admitting any claim on the policy, brought an action against S. and his wife for the damage done by the act of the wife. *Held*, first, that the action could not be maintained, as the insurer has no rights other than those of his assured, and can enforce those only in his name and after admitting the claim on the policy. Secondly, that the action for the felony if it were maintainable was maintainable without showing that the felon had been prosecuted. *Semble*, that a felonious burning by the wife of the assured, without his privity, is covered by the ordinary fire policy. Cases referred to, Simpson v. Burrill, L. R., 3 App. Cas. 276; Randall v. Cockran, 1 Ves. Sen. 98; North of England Ins. As. v. Armstrong, L. R., 5 Q.B. 244; Stewart v. Greenock Mar. Ins. Co. L. R., 2 H. L. Cas. 157; Davidson v. Case, 8 Price, 542; Mason v. Sainsbury, 3 Doug. 61; Yates v. Whyte, 4 Bing. N. C. 272; Riggins v. Butcher, Yelv. 89; S. C., Noy. 82; Markham v. Cobbe, Sir W. Jones, 147; S. C., Noy. 82; Dawkes v. Covenigh, Sty. 346; 1 Hale's P. C. 546; Hudson v. Lee, Rep. 43a; Crosby v. Leng, 12 East, 409; Lutterell v. Reynell, 1 Mod. 282; Gimson v. Woodfull, 2 C. & P. 41; White v. Spettigue, 13 M. & W. 603; Stone v. Marsh, 6 B. & C. 551; Wellock v. Constantine, 2 H. & C. 146; Wells v. Abrahams, L. R., 7 Q. B. 554; *Ex parte* Ball, L. R., 10 Ch. D. 667. Q. B. Div., March 23, 1881. *Midland Insurance Co. v. Smith*. Opinion by Watkin Williams, J., L. R., 6 Q. B. D. 561.

GENERAL NOTES.

By an act approved recently, the salary of the Chief Justice of the Supreme Court of Pennsylvania was fixed at \$8,500 per annum, and that of each of the associate judges at \$8,000.

The Legal News.

VOL. IV. SEPTEMBER 10, 1881. No. 37.

CONFINEMENT AFTER EXPIRATION OF SENTENCE.

The *Criminal Law Magazine*, for September, contains a case of some interest, *Gross v. Rice*, in which a question arose as to the constitutionality of a statute of Maine, providing that no convict shall be discharged from the State prison until he has remained the full term for which he was sentenced, *excluding the time he may have been in solitary confinement for violation of the rules and regulations of the prison*. The prisoner who had been sentenced for four years, was in solitary confinement at various times for 144 days, for a number of reasons; and he was not discharged until he had served his sentence and 68 days' imprisonment additional. This extension of the term of imprisonment for which he had been sentenced by the Court, was held to be in derogation of a provision of the national constitution, that no State shall deprive any person of life, liberty or property, without due process of law. Although, therefore, a convict may by good conduct earn remission of a portion of his sentence, he cannot prolong it by any measure of misconduct. This view, which seems reasonable enough, was held by four judges of the Supreme Court of Maine. Two differed, and the seventh, being a relative of the defendant, did not sit.

JUDICIAL INCREASE.

New York State is proposing to add at one stroke twelve additional justices to its Supreme Court, and an amendment to that effect, of the judiciary article of the State Constitution, is pending, to be voted on at the election next fall. Even this enormous increase, it is said, will be only an alleviation, not a cure, of existing ills. In Massachusetts, the Bench also seems to be hard pressed, for Judge Colt recently committed suicide in a fit of melancholy and distraction brought on, it is said, by overwork.

LORD SHERBROOKE ON BANKRUPTCY LEGISLATION.

"A great deal of time, of trouble, of expense, and of misery, would have been saved to mankind if legislators could have been induced to consider more narrowly not only what they are legislating about, but for whom they are legislating, and what good society is likely to derive from their work."

Thus writes Lord Sherbrooke with reference to the subject of bankruptcy legislation; and in this, the opening sentence of an able article on "What shall we do with our Bankrupts?" which appears in the current number of the *Nineteenth Century*, his Lordship propounds a theory which, as regards the particular subject he has taken in hand, is especially true and appropriate. The fact is that in bankruptcy legislation we have never properly considered for whom we are legislating. The main object which our legislators seem to have had in view has been the comfort and convenience of those unable or unwilling to pay their just debts, rather than the protection of those whom one would think were most deserving of consideration—innocent and gullible creditors. Had it been otherwise, and had we thought more of the interest of the honest trader, rather than of the dishonest, or, at any rate, careless debtor, our commercial morality would probably be far higher than it is. This is the line of argument which is suggested by a perusal of Lord Sherbrooke's article. It bristles with interesting historical and classical references; it is a short but clear and concise history of bankruptcy legislation from the earliest times downwards to the present day, and in it the author shows what a great mistake we made in protecting the debtor in the way we do.

Before embarking on the contemplated revision and reconstruction of our present bankruptcy code, Lord Sherbrooke retraces the history of the bankruptcy laws from their earliest date, and points out the steps by which a code which has existed in one shape or another for so long a period now comes, in the fulness of time and the exhaustion of every conceivable remedy, to be re-created, or at any rate, redressed. He first treats of the legendary origin of bankruptcy as mixed up with the fabulous period of Roman history, and he next opens up the great question of English bankruptcy law,

which he alleges was founded on a singularly unsound and narrow basis. He traces out the origin of the theory whereby it was considered how traders were assumed to be the only persons who have any right to run into debt, and, while declining to refute the arguments which satisfied our forefathers as to this part of the subject, he brings us down to the beginning of the present reign, when courts for the relief of insolvent debtors were first established. Later on we come to the period which witnessed the abolition of all distinctions between those who are not engaged in trade and commerce. A fresh domestic mischief then began to eat into the very heart of the system, which Lord Sherbrooke very vividly describes: "Much care had been taken of the debtors, writes his Lordship, but very serious complaints arose on the part of the creditors. Somehow or other the dividends on insolvent estates began to fall fearfully short. The Court of Bankruptcy was a sink into which money was continually poured, but where, with the true instinct of gravity, it never rose again. The system worked with what Lord Byron somewhere calls ruinous perfection. The army of bankruptcy was complete in all its parts, and the very model of a perfect and well-ordered department. All went merry as a marriage bell, until a fault, which in no degree injured the symmetry but somewhat diminished the popularity of this splendid system, began to make itself manifest. The official assignees gathered to themselves an evil repute, and creditors discovered that the Bankruptcy Court had one fault; a great deal of money went into it, and a very little ever came out. As a natural result the whole machinery of bankruptcy was brought to a standstill. Once more Parliament went to work, and another Bankruptcy Bill was the result. The plan of trusting the property of bankrupts to officials had turned out a complete failure, and the state of the Bankruptcy Court had been allowed to become a public scandal. The course which the government of the day took was a very natural one, and deserved, as Lord Sherbrooke suggests, better success than it achieved. It produced the elaborately worked-out Bill of 1869, which entirely remodelled the bankruptcy law, taking the management of bankrupts' estates out of the hands of government officials, and giving it to

those who have a direct interest in obtaining the very largest dividend possible—the creditors themselves. Nothing could seem fairer than such a proposition, writes Lord Sherbrooke. It was clearly the interest of the creditor to obtain as large a dividend as possible, and as clearly he was invested with the power, what more could be desired? I cannot say that there was any fault in the reasoning as far as it went, continues his Lordship. Its error was that it did not take into consideration certain other feelings which ultimately proved too strong even for the very powerful motives which in this case seem at first sight to make the private identical with the public interest. The creditor dislikes the whole subject. He has been done. He knows what many people, in dealing with these subjects, seem studiously to forget, that without lenders there would be no borrowers. He does not like to pass as an unsuccessful man, still less as a man who has been taken in. He would rather do and think of something else. The business is intricate, and the prospect of a dividend scarcely worth the trouble it is sure to entail. In this strain Lord Sherbrooke goes on still further. It is quite evident to him that a system of this kind can be satisfactory to no one but the dishonest creditor. It is founded on a totally false estimate of human nature. It is a signal and conspicuous failure, and the riddle, continues our author, is as far from being solved as ever.

Lord Sherbrooke next comes to the bill brought into the House of Commons this session, but he has no belief in its healing virtue. He sees no reason why the Board of Trade should displace the Chancellor, nor why an official of less rank and infinitely less knowledge should displace the unquestioned head of the English Bar. This, he says, is wanton innovation; and he considers it a very bold and startling innovation to mix up a political office like the Board of Trade with the duties of a court of law. Much might also be said of the difficulties which such a supervision would impose upon a court fettered and dictated to by such superior officers of the courts, whose principal duty shall be to act as spies upon the bankrupt, and who, as *ad interim* receivers of his estate, do not appear to Lord Sherbrooke very promising additions to

an already somewhat discredited institution. They seem too closely connected with him to be able to act as his friends. The fault of bankrupt proceedings, he thinks, is clear enough, and will instantly appear when compared with ordinary litigation.

An impartial judge and two litigants or advocates, whose interest or whose business it is to sustain a distinct and clearly marked controversy, has been found by the theory and practice of mankind to be the only way of satisfactorily determining controversies relating to property. One great and fatal weakness in the Court of Bankruptcy is that this conflict is wanting. The question is not as to the decision of the battle, but as to the quantum of the loss.

Lord Sherbrooke next propounds the three grounds on which he says the adoption of a bankrupt law may be supported. The first is to mitigate the cruelty of the common law, which is now entirely obsolete; the second, the necessity of punishing the failure of the particular contract in question, namely: that between borrower and lender, in a manner quite different from the manner of treating all other contracts, which he has shown, he trusts, has nothing left on which it can be supported; and the third, which consists in the machinery devised for making an equal division of the wreck of the property amongst the creditors. His Lordship denies that natural equity requires that the wreck of the estate should be divided among the creditors. It appears to him that the law of bankruptcy has ceased to be required as a refuge from the harshness of the general law; that it has been the fruitful mother of chicanery and embezzlement; and that against these and many other objections there is nothing to offer except the public semblance of equity exhibited by the empty show of a symmetrical dividend, the substance of which the Bankruptcy Court has previously devoured. It seems to him that these considerations, joined to the fact that the present bill has been twice amended during the present reign, and is now about to undergo a third transformation, and to masquerade as a hybrid department of the State, have given us sufficient proof that the time is come when, as Hamlet says, we ought to reform it altogether. His Lordship ventures to think that he has shown

ample reasons why the Bankruptcy Court should no longer be a snare to us; and that, having perplexed and disgraced our statute book for several centuries, it should perplex and disgrace it no more. If asked what he would put in its place, he answers without hesitation—nothing. He reminds us that we have a common law purified from the barbarism of imprisonment for debt, and he cannot see that we require anything more except a measure to shorten the Statute of Limitations. The effect of such a law would be, he believes, most salutary; with nothing but the estate of the debtor to look to, he thinks there would be fewer bad debts; trade would be more safely and therefore more profitably managed, and the ridiculous notions as to the peculiar wickedness alternately imputed to borrowers and lenders, would, he contends, be once and for all exploded. Lord Sherbrooke does not deny that the estate of a bankrupt belongs to his creditors. He admits that they ought to have full control over it; but, he goes on to say, have we not abundant experience that to give them control is of small avail unless some hitherto undiscovered deity will impart what he has hitherto firmly denied to our prayers—the will and strength to use it. Repayment on any considerable scale through the bankrupt law is, he contends, a patent and threadbare delusion; and, in conclusion, he argues that it is better that debts should be paid unequally than that the property should be destroyed in the effort to ascertain an equality which yields a purely metaphysical and imaginary satisfaction to the thirsty creditor.—*London Law Times*.

TRADE MARK IN NAME OF PUBLICATION.

In a case of *Walter v. Head*, before the Master of the Rolls, on the 22nd July, a motion was made to restrain the defendant from selling any newspaper under the name or title of the *Times*. The defendant had been issuing reprints of old copies of the *Times*, which were exact *fac similes* of the former issues, except the last sheets, upon which the defendant had inserted advertisements for his own profit. He had also issued future numbers of the *Times* as skits, also inserting advertisements for profit. The prices of the defendant's issues and those of the plaintiffs

were dissimilar, but the name and the device and arms at the commencement of the defendant's issues were exactly the same as the plaintiffs'. The plaintiffs now moved for an injunction, on the ground that the defendant's issues were a colorable imitation of the plaintiffs', and an infringement of their trade-mark in their name and device. For the defendant it was contended that the plaintiffs had no special property in the name of the *Times*, which was used in conjunction with other words by numerous other papers, and further, that the only ground upon which the plaintiffs could succeed was that the issues of the defendant were calculated to deceive the public into the idea that they were buying those of the plaintiffs, which it was submitted they were not. Jessel, M. R., was of opinion that the issues by the defendant were an exact copy of the plaintiffs' paper; that the plaintiffs had a right of property in their name and heading, which the defendant had infringed; and that the defendant had also attempted to appropriate one of the most profitable branches of the plaintiffs' business—their advertisements—and he must therefore grant the injunction asked for.—*Solicitors' Journal*.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, June 30, 1881.

DORION, C. J., MONK, RAMSAY, CROSS, BABY, JJ.
ROBERT (plff. below), Appellant, and THE CITY
OF MONTREAL (deft. below), Respondent.

Prescription—C. C. 2261.

Where the action is not an action for damages resulting from an offence or quasi-offence, but merely claims the price or value of materials wrongfully taken away, the two years' prescription under C.C. 2261 does not apply.

The judgment appealed from was rendered by the Superior Court, Montreal (Jetté, J.), September 30, 1879, dismissing an action brought against the Corporation of Montreal for the value of certain fencing. The judgment was as follows :—

"La Cour, etc. . . .

"Considérant que les faits établis en preuve démontrent que les clôtures dont le demandeur réclame la valeur ont été enlevées en 1874 et

en 1876, c'est-à-dire plus de deux ans avant l'institution de l'action, et ce par Donnelly, l'entrepreneur des travaux de l'aqueduc ;

"Considérant que les prétendues reconnaissances de la réclamation du demandeur et de la responsabilité de la cité que le demandeur prétend avoir été faites et données par Louis Lesage, surintendant de l'aqueduc, et qu'il invoque comme interruption de la prescription de deux ans acquise contre sa demande, ne sont pas prouvées et que le fussent-elles, elles ne pourraient lier la défenderesse, attendu que le dit Lesage n'avait aucune autorité pour lier la corporation sous ce rapport ;

"Maintient la première défense de la défenderesse à l'action du demandeur, déclare en conséquence que la dite action était prescrite lors de l'institution d'icelle par la prescription de deux ans établie par l'article 2261 du Code Civil, et la renvoie avec dépens."

RAMSAY, J. (*diss.*) I do not think the prescription of Art. 2261 C. C. applies to a case like the present. There is no question of a *quasi-délit* here. The obligation turns on a *quasi-contrat* rather. There was an error as to rights under a contract, and without any idea of wrong-doing, the contractor made use of the fencing which he had properly removed. There is some difficulty as to the classification adopted by the C. C. 983, notwithstanding its symmetrical form (Ortolan III, Nos. 1198 and 1621). Since, then, Art. 2261, C. C. compels one to attribute the obligation to its origin, it seems to me it takes its rise in what resembles a contract, rather than in what resembles an offence—let us translate it trespass. This helps us to settle another point in this case, namely the pretension that the contractor and not the Corporation is liable. It seems to me Donnelly only acted, and indeed he could only act for the Corporation. What he did was under a misapprehension of the rights of the Corporation, therefore it is impossible to say that the Corporation can send the plaintiff to his recourse against Donnelly. They had full notice of the claim, and they should have settled the matter with Donnelly. Again, I do not think the Corporation can ignore the acts of their agents Lesage and McConnell. They were evidently performing duties which a corporation can only perform by an agent, and their acts within the scope of these duties necessarily bind the Cor-

poration whether ratified or not.

As to the facts, there can be no difficulty; the use made of some of the fencing is distinctly traced, and although Robidoux says some of it was carried away and burned by himself and others, Lesage tells us that it appeared to be in the possession of Donnelly. I am, therefore, of opinion to reverse.

BABY, J., also dissented, and concurred in the reasons stated by Ramsay, J.

DORION, C. J., remarked that there was no difficulty that prescription could not be invoked in this case. It was not an action based on a *délit* or *quasi délit*; it was an action for the value of the fencing taken away. It seemed absurd that if a man sold goods, he would have five years to bring his action, but if somebody took them away, the claim would be extinguished by the lapse of two years. The judgment could not be supported on the reasons stated therein; but on the merits the claim must fail, because the corporation was not liable for the act of Donnelly in using part of the fencing.

MONK, J., said that the judges were all agreed that the two years' prescription did not apply. Upon the merits, the majority of the Court were of opinion to confirm.

The judgment is as follows:

"La Cour, etc....

"Considérant que l'appelant a porté cette action pour recouvrer de l'intimé le prix et la valeur des matériaux de la clôture qui existait en 1872 sur un terrain qu'il a vendu, ainsi que ceux qu'il représente, à l'intimé, pour y faire un nouvel aqueduc, désigné sous le nom d'*Inland Cut*, lesquels matériaux l'appelant, et ceux qu'il représente, s'étaient réservés le droit d'enlever;

"Et considérant qu'il est prouvé que John Donnelly, qui avait entrepris pour l'intimé de creuser le canal pour le dit aqueduc, a défait les dites clôtures lorsqu'il a commencé les travaux dans l'automne de 1873, et que les matériaux sont demeurés entassés sur les lieux jusqu'au printemps suivant, sans que l'appelant, ni ceux qu'il représente, ait fait aucune démarche pour les enlever, ainsi qu'ils avaient le droit de le faire;

"Et considérant qu'il est de plus prouvé qu'une partie de ces matériaux, ainsi demeurés sur les lieux, ont été brûlés par des personnes demeurant dans les environs, et que le reste, sans qu'il soit possible de déterminer la quan-

tité, a été employé par Donnelly lui-même pour faire une clôture temporaire, pour séparer la terre de la veuve Dunberry du terrain qu'elle avait vendu à l'intimé, clôture que le dit Donnelly était tenu de faire à ses frais, en sorte que la dite intimée n'a pas profité des matériaux ainsi employés par le dit Donnelly;

"Et considérant que les prétendues reconnaissances de la réclamation du demandeur, et de la responsabilité de la cité, que le demandeur prétend avoir été faites et données par Louis Lesage, surintendant de l'aqueduc, ne sont pas prouvées, et que, sous ces circonstances, l'intimée n'est pas responsable du prix et de la valeur d'aucune partie des matériaux, perches et piquets de la clôture que le dit appelant et ceux qu'il représente s'étaient réservés le droit d'enlever;

"Et considérant qu'il n'y a pas d'erreur dans le jugement rendu par la Cour Supérieure à Montréal, le 30e jour de septembre 1879;

"Cette Cour, pour les raisons ci-dessus, et non pour celles données dans le dit jugement, confirme le dit jugement."

(*Dissentientibus Ramsay and Baby, JJ.*)

Judgment confirmed.

Counsel, Girouard, Wurtels & Sexton for appellant.

R. Roy, Q. C., for respondent.

SUPERIOR COURT.

[In Chambers.]

MONTREAL, Sept. 7, 1881.

Before MACKAY, J.

LOW v. MONTREAL TELEGRAPH CO.

Injunction—Interim Order.

In a suit attacking the validity of an alleged transfer of the telegraph lines and franchises and privileges of a telegraph company, the Court will not grant, before return of the action, an interlocutory order restraining the company from raising the rates for the transmission of telegraphic communications in pursuance of the agreement.

MACKAY, J. The Montreal Telegraph Company is incorporated under 10 & 11 Vic., cap. 38. Under section 1 of this Act its franchise is acquired, corporate name and powers are conferred upon it, and it is enacted that also they and their successors shall be in law capable of purchasing, having and holding to them and

their successors any estate, real and personal, or mixed, to and for the use of said Company, and of letting, conveying or otherwise parting therewith for the benefit and on account of the said Company from time to time as they shall deem necessary or expedient.

On the 7th of August last the Montreal Telegraph Company made an agreement with the Great North-Western Telegraph Company, by which the latter Company is for 97 years from the 1st of July last to work and operate the system of telegraph owned and heretofore operated by the Montreal Company, collecting in the name of the Montreal Company such rates as the said Company shall establish from time to time, etc. The contractors, the Great North-Western Company, are to have the right to use and occupy during the term of the agreement all the stations, offices and buildings of the Montreal Company, except the board room of the Company in Montreal, the Secretary's room adjacent, and a sufficient portion of the vaults of the Company for the safe custody of books, papers, etc., etc. But the Montreal Company may sell for its own benefit the buildings in Montreal and Ottawa, not now used or required for the use of the Company in its business. Upon the requisition of the Great North-Western Company, the Montreal Company shall from time to time change their tariff of fees and rates in such manner as shall be ordered in such requisition, provided the rates per ten words over the present lines of the Montreal Company in Canada do not exceed twenty-five cents, but subject to be increased, etc., etc. The Great North-Western Company oblige themselves to pay to the Montreal Company quarterly, during the term of the agreement, \$41,250, etc., etc., also all costs of operating, municipal taxes and assessments on property occupied by the Great North-Western Company, etc. After this follow clauses for the cases of the Great North-Western Company not paying punctually, etc.

On the 23rd of August the plaintiff, Mr. Low, a stockholder in the Montreal Company, commenced a suit against the Montreal and Great North-Western Companies to have the agreement before referred to declared *ultra vires* of the Montreal Company and to have the defendants enjoined not to carry out the same, that the Montreal Company be ordered to resume possession of all that it nominally parted with by

the said agreement, that the Great North-Western Company be ordered to give up all it acquired by the said agreement and to cease to operate the lines of the Montreal Company. The return day of the writ was September 5th. One of the plaintiff's principal allegations is to the effect that the Montreal Company has no power to sell, lease or convey its telegraph lines or any dues or charges for transmitting telegrams or any of the privileges or franchises conferred upon it by statute, or to delegate to any other corporation whatever its powers or functions; (as by the agreement in question it is contended that it does).

On the 29th of August, before the return of the writ, the plaintiff presented a petition asking for an interlocutory order enjoining and restraining the Montreal Company from raising rates for the transmission of telegraphic communications over their lines above the present rates of twenty cents for ten words and one cent for each additional word, until final judgment be rendered in this case or until it shall be otherwise legally ordered, etc. The petition reposes on allegations that the petitioner is informed that the Montreal Company is, under the illegal agreement of August 7th, immediately about to change its rates by increasing of the same at the requisition of the G. N. W. Company, and for the interest of the latter, and not of the Montreal Company or its stockholders, that if the Montreal Company is not restrained from so acting, petitioners' interests will be damaged and endangered by the action of the Montreal Company provoking the formation of opposition companies, and leading to the Attorney-General taking steps to have the Company's charter forfeited, etc., etc.

Upon this petition the defendants simply appeared without written appearances, answered nothing by writing, but filed an affidavit of their manager and chief agent Mr. Dakers. Mr. Dakers was cross-examined, and thereupon and upon oral argument the petition was submitted. From Mr. Dakers' statements we may say that Mr. Low was right in believing, on the 29th of August, that the Montreal Company was about to change their rates by increasing them, for from the 26th of August at 6 p.m. the rates had been raised by Mr. Dakers and the Montreal Company by order of Mr. Wiman, of the G. N. W. Company. Mr. Dakers says that on

the 25th of August the President of the Montreal Company verbally authorized the raising of the rates, but whether from that date or on the 1st of September, is not clear. Mr. Wiman asked for the raising of the rates to take place even before the first of September, by a telegram from Toronto after Mr. Dakers had received service of Low's process. This telegram was communicated to the President of the Montreal Company, who simply advised Mr. Dakers to consult with Mr. Tait, defendant's counsel. It seems, however, that the President had before that verbally authorized Mr. Dakers to raise the rates, but from what time it is not clear. On the 19th of August the Directors of the Montreal Company passed a resolution as follows:—"As by the agreement of this Company with the G.N.W. Telegraph Company, the rate charged by this Company was to be increased to 25 cents to make the business remunerative, it is hereby resolved that the rate for ordinary messages throughout this Company's lines in Canada be raised to 25 cents per ten words, and one cent per word extra at such time as shall be ordered by the president, who is hereby authorized to fix such time."

Mr. Low's petition must be granted, if at all, by Judge or Court, holding sound his proposition that the agreement of 17th August was and is, beyond legality, beyond the power of the Montreal Company. He wants it declared that the act complained of (raising the rates) is illegal, because the agreement, in pursuance of which the act is proposed to be done, is illegal. His counsel have argued that the agreement is illegal because the Montreal Company has exceeded its powers by entering into the agreement referred to.

I agree with the counsel that it may be considered as settled that a corporation cannot lease or alienate any property necessary to perform its obligations and duties to the State without legislative authority; also that the powers of such a Company as the Montreal Company are only those of their charter. What is expressly granted, and what may fairly be implied as granted, may be taken, I hold, to be the measure of the Company's powers. I agree that a lease by a railway Company of its road and rolling stock, there being no authority to lease given by the charter, is *ultra vires* and void. I agree that a Railway Company requires legisla-

tive authority to hand over its line to be worked by another Company (*Beman v. Rufford*). But does it follow that at this stage of the case, upon a summary petition like this made before the return day of the writ, in a suit brought for the very purpose of having this agreement declared *ultra vires* and illegal, I ought to declare the agreement illegal and grant the petition? The petition as formulated can be granted only on a finding that the agreement is illegal. It is plain that acts which without legislative authority are null may be perfectly good if sanctioned by legislative authority. The Montreal Company's charter, article 1, allows, etc. (as I have stated in commencing). Upon such a charter taken with the agreement, or say rather, upon such an agreement taken with such a charter, is there no room for argument that the agreement is not *ultra vires*? I ought not now to decide this question. Its decision must depend upon the settlement of several other questions. What is a franchise? Does the agreement alienate the Montreal Company's franchise? What is leased or "parted with" by the agreement? Upon the question of what is *ultra vires* in cases analogous to the present one judges differ. In the last English case of the kind (*Attorney-General v. Great Eastern Railway*, 27 English Law reports, page 672), the Master of the Rolls and the Attorney-General were upon an appeal held, by two judges against one, to have committed error. The matter is discussed in the case of *Thomas v. West Jersey Railway Company* (Albany Law Journal, vol. 21, page 409). I have resolved to grant no injunction at present, but to suspend final judgment upon the petition until after judgment in the principal cause to which I order this petition to be joined. Costs reserved.

Maclaren & Leet for petitioner.

Bethune, Q. C., and *Lacoste, Q. C.*, counsel.

Abbott, Tait & Abbott for the Company.

Girouard, Q. C., counsel.

COURT OF REVIEW.

MONTREAL, April 29, 1881.

TORRANCE, RAINVILLE, JETTÉ, JJ.

[From S.C., Montreal.

DUSTIN V. THE HOCHELAGA MUTUAL FIRE INSURANCE CO.

Mutual Insurance Company — Consent to other insurance.

The statutory requirement applicable to insurance in mutual insurance companies, that the consent of the directors must be signified by an endorsement on the policy, or other acknowledgment in writing, is not satisfied by evidence of mere knowledge by the insurers of other insurance.

The judgment, from which the present inscription was taken, was rendered by the Superior Court, Montreal (Johnson, J.), Jan. 31, 1880, dismissing the action. The learned judge made the following observations:—

"This is an action to recover the amount of a fire policy, and the defendants, being a mutual society, plead the statute which voids an insurance contract, where there has been another insurance effected without their consent; and also a special condition of the policy (No. 5) to the same effect. This is the principal point in the case. A variety of circumstances were adverted to, tending to show a knowledge by the defendants of the existence of another contract. That, however, does not appear to me, under any reasonable view of the law, to be enough. There must be a consent. The words of the statute are: 'unless the double insurance subsists with the consent of the directors signified by endorsement on the policy signed by the manager or secretary, or other officer authorized to do so, or otherwise acknowledged in writing.' This is not satisfied by evidence of mere knowledge on the part of the insurers of other contracts. Besides, the evidence seems to me to show that the Company only took the risk because they understood the application to the other office had been withdrawn.

"There are other points raised; but I do not enter upon them; because I am of opinion to maintain the defendants' first plea, and dismiss the action."

In Review, the judgment was confirmed, Jetté, J., dissenting.

Greenshields & Busted, for plaintiff.

Davidson & Cross, for defendants.

GENERAL NOTES.

The *American Law Review* for August contains the following leading articles: Liability of officers acting in a judicial capacity, by Arthur Biddle; Why should not a decedent's real estate descend and be administered like personality? by Wm. Reynolds; Subjection of the State to law, by Roger Foster.

About fixing Friday for executions a correspondent writes to a N. Y. contemporary:—"The judges of the Supreme Court ought not to foster this superstition by making an almost invariable practice of sentencing criminals convicted of murder to be executed on Friday. In my acquaintance a respectable lawyer, under the influence of prejudice, avoided the commencement of any new business on Friday. There are many things which must be done on Friday. Becoming a mother cannot be adjourned, and there is no reason why the day of the nativity of one equal seventh of mankind should be clouded by a cruel old custom sanctioned by judicial authority. Are not Friday-born people entitled to relief? Let the judges appoint some other day of the week for the execution of the sentence by hanging of the convict by the neck until he be dead."

The lawyer's legitimate fee, says Judge Cooley, is payable irrespective of the result, and he is supposed to occupy a position from which he can contemplate the controversy with a desire that the correct rule of law shall be applied, and the truth be expressed in the judgment, whether the result to his client be favorable or unfavorable. This is a statement which would probably give rise to strong opposition, even from lawyers of the most pure and upright character. Lord Brougham would certainly not have been content to adopt Judge Cooley's view, nor is it necessary to do so in order to express condemnation of the "no cure no pay" system. The conclusion to which Judge Cooley arrives is, that if poor persons need assistance to enforce their rights, and are unable to pay for it, a lawyer ought to prefer to give assistance as a matter of charity, rather than place himself in a position antagonistic to his duty and the interest of his client. Probably this is the only safe way of deciding the question.—*London Law Times.*

If a judicial decision were necessary to demonstrate that Americans spit, it would not be wanting. In 7 Federal Reporter are several cases involving patents on "cuspidors," which, we believe, is the genteel expression for spittoons. In *United States Stamping Co. v. Jewett*, id. 869, we find the following choice extract: "As to one of the Weber cuspidors which Mr. Adams had in his house, given to him by Weber, Mr. Adams states, in his testimony, that he had it in his family as early as 1868—probably, he says, the first of January, 1868—and that it was a New Year's present to aid in furnishing a new library, completed in 1867. Mrs. Adams, his wife, testifies that this Weber cuspidor was brought to her house in 1867 or 1868, after the library was completed, and two years certainly before she went to Europe, which was July 12, 1870; that she connected it with another gift which was received about the same time—a fire-screen—given by Mr. John Dow, the screen being a cut-glass one, in which the cuspidor was reflected; that the cuspidor was also reflected in a mirror and in the windows of a book-case; and that the room appearing to be full of cuspidors, the article was sent into the attic." A room apparently full of spittoons is too disgusting to contemplate, of course, but it seems rather onerous on Mr. Adams to compel him to go up to the attic every time he wanted to spit. Why did not Mr. Adams banish the fire-screen? This account shows who was the stronger party in that household. A spittoon as part of the furniture of a library seems a novel idea. It might possibly be useful during the reading of those books which Lord Bacon says are "to be chewed."—*Albany Law Journal.*

The Legal News.

VOL. IV. SEPTEMBER 17, 1881. No. 38.

NEW PHASES OF CRIME.

In an article on "La criminalité moderne," which appears in *L'Opinion Publique*, Mr. J. A. N. Provencher notices some of the more recent developments of the criminal passion. The most important of these is the crime of wrecking railway trains, by placing obstructions on the track. "Avec les changements d'affaires," says the writer, "les naufrageurs ont modifié leur mode d'action; les chemins de fer ont remplacé la navigation, ils se sont fait naufrageurs de trains. Ceci nous paraît le comble de la lâcheté, de la mesquinerie dans le crime, de l'absence de tout sens de moralité.

"Il se présente de curieuses coïncidences, des traits intéressants, des variétés d'immoralité, dans ces classes criminelles; mais ce qui domine généralement, c'est la lâcheté. Les peuples du midi, dont le sang bout plus vite, dont les haines sont plus vivaces, dont les rancunes sont plus durables, dont les vengeances sont plus artistiques, ont conservé l'usage du poignard. Ils frappent dans le dos, c'est vrai, mais ils ont du moins la satisfaction de sentir la chair se crispant sous le fer; à mesure que l'arme pénètre, la vengeance se satisfait. On la touche de la main, on la sent, on compte les pulsations de la victime, on mesure son agonie.

"Aux peuples du nord sont inconnues ces jouissances qu'ils ne sauraient apprécier; le courage leur fera défaut. Ils ne peuvent tuer qu'à distance.

"Alors se manifeste leur faiblesse de sentiment, et leur défaut d'équilibre moral: ils ne veulent pas voir souffrir la victime. Le reste leur importe peu.

"Tel individu qui ne voudrait pas égorger un poulet ira, sans remords, enlever un rail du chemin de fer, et risquer la mort d'une dizaine d'individus; après avoir préparé son embuscade, il s'en ira tranquillement dormir.

"C'est un singulier phénomène que ce mépris de la vie des autres, quand on ne sait pas d'avance quelles seront les victimes. L'opinion publique n'aura pas assez d'expressions violentes

pour condamner un meurtre prémédité contre une personne en particulier, et on ne frappera que d'une condamnation anodine un attentat qui, suscité par une absurde et mesquine rancune contre un gouvernement, une compagnie, un être impersonnel, aura tué vingt personnes.

"Et ici, il faut s'arrêter sur un détail important. De temps à autre, on apprend qu'un train a déraillé parce qu'il y avait des pierres sur la voie, ou qu'un rail avait été enlevé; alors l'opinion publique s'émeut, et on demande une punition exemplaire. Ce qu'on ne sait pas, c'est que dix pour une de ces tentatives ne sont pas connues du public. Les inspecteurs de la voie ou les cantonniers éloignent simplement l'obstacle, le train passe, et les passagers ne se doutent de rien."

The writer is in favor of greater severity in the punishment of crime, by way of deterring from the commission of it. We think he might have gone even farther. A crime such as an attempt to throw a train from the rails should be stamped with infamy, and when committed by an accountable being, should be punished with the lash, in addition to the ordinary sentence of imprisonment. If the crime of the garrotter was appropriately punished by corporal pain, still more does that of the train wrecker deserve the acutest and most disagreeable sensation that the "cat" can inspire.

SENTENCE.

In the case of *Ex parte Lefevre*, on p. 253 of this volume, reference was made to a case of *Ex parte Cherel*, decided in January last by Mr. Justice Monk, in a contrary sense. We give, in the present issue, a note of that decision, condensed from a report which appeared in *La Minerve*, and which seems to have been prepared under the supervision of the counsel concerned in the case. We regret that it is not more complete in its reproduction of the observations of the learned judge, for the report, as it stands, leaves us still under the impression that the decision in *Ex parte Lefevre* is sound law, though the judgment in *Ex parte Cherel* is said to have been concurred in by the other members of the Court (the Chief Justice and Justices Cross and Baby). We may say that the Recorder, since the decision in *Ex parte Lefevre*, has wisely determined not to add the punishment of hard labor where fine and imprisonment are ordered.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, Sept. 7, 1881.

Before TORRANCE, J.

LEFAIVRE v. BELLE.

*Séparation de corps—Pleading—Reciprocity of wrongs.**In an action of separation, for adultery, the defendant cannot plead in bar acts of adultery on the part of the plaintiff.*

The demand was for *séparation de corps*, with forfeiture of matrimonial rights, by husband charging wife's adultery. The case came up on an answer in law to a portion of defendant's plea, which alleged neglect, misconduct and ill-treatment by plaintiff.

PER CURIAM. The case of *Brennan v. McAnally*, 21 L.C.J. 301, appears to be in point, that a reciprocity of wrongs is no answer to the action. Our code is very clear. C.C. 211. "For whatever cause the separation takes place, the party against whom it has been declared, loses all the advantages granted by the other party." The answer in law should be maintained.

Answer maintained.

Judah & Branchaud for plaintiff.

B. C. Maclean for defendant.

SUPERIOR COURT.

MONTREAL, Sept. 7, 1881.

Before TORRANCE, J.

In re ROBERT J. HOPPER, insolvent, petitioner, and ELLIOTT, contesting.

Security for costs—Insolvent—Contestation of petition for discharge.

A foreign creditor is not bound to give security for costs, to an insolvent whose petition for discharge he is contesting.

The petitioner applied for his discharge under the insolvent act, after giving the usual notices to his creditors. One of them, Archibald Elliott, resident in Ontario, appeared in due course, and asked delay to file a contestation. This delay was granted, and the petitioner then moved the Court that all proceedings be stayed on the part of the contestant until he should have given security for costs, under C.C. 29, as a non-resident.

PER CURIAM. The question here is whether the petitioner or the contestant is prosecuting a right or initiating a proceeding. The petitioner began by his petition asking for a discharge. He had to give notice under sec. 53 of the Insolvent Act, and the creditor could appear and oppose. The creditor is on the defensive so far as the discharge is concerned, and it would appear strange that he could not exercise his right of defence against the liberation of his debtor without first giving security, on a proceeding not initiated by him, but by the petitioner, who has forced him to intervene and show cause, if he could, against the discharge, or be for ever silent. Pothier, *Des Personnes*, p. 577, says: "Cette caution n'est due par l'étranger, que lorsqu'il est demandeur, et non lorsqu'il est défendeur; parce que, s'il comparait en jugement, ce n'est que parce qu'il y est forcé."

Motion rejected.

T. & C. C. DeLorimier for petitioner.

Macmaster, Hutchinson & Knapp for creditor.

SUPERIOR COURT.

MONTREAL, Sept. 9, 1881.

Before TORRANCE, J.

Ex parte LAMOUREUX, petitioner for *certiorari*, and LUTTRELL et al., respondents.

Commissioners' Courts—Opposition—Procedure—C.C.P. 1206, 1208, 1214.

An opposant in a case before a Commissioner's Court is not bound to proceed to proof on the return day, but is entitled to have a subsequent day fixed for trial.

PER CURIAM. This was an application for a writ of *certiorari*. The applicant was an opposant à fin de distraire to withdraw certain movables from a seizure in the Commissioner's Court.

The Court sat on the 1st August, and the opposant not appearing, the opposition was forthwith dismissed. The petitioner claimed that he had a right to another day, and that his opposition should not have been dismissed summarily. In support of his petition, petitioner called attention to C.C.P. 1206, 1208, 1214. The Court would also call attention to the C.S.L.C., cap. 94, s. 33 and s. 43. Section 33 says: "Except as hereinafter excepted, the

witnesses in any suit shall not be summoned to attend on the day of return," &c. ; and s. 43 makes the rules the same for oppositions as for suits. It would appear, therefore, that the witnesses for the proof of the opposition should not have been required for the return day, but another day should have been fixed for proof.

The writ will be ordered to issue.

Mireault for petitioner.

SUPERIOR COURT.

MONTREAL, Sept. 9, 1881.

Before TORRANCE, J.

MATHIEU v. TREMBLAY et al., and LIONAIS, petitioner.

Alimentary allowance—Judicial surety.

A judicial surety in gaol is not entitled to an alimentary allowance.

The petitioner asked for an alimentary allowance under C.C.P. 790. He was a judicial surety in gaol.

PER CURIAM. The article 790 applies to a debtor confined under a capias. It was decided in *Cramp v. Cocquereau*, 3 Legal News, 332, that the judicial surety was not entitled to the allowance.

Loranger, Loranger & Beaudin for plaintiff.

Descarries for petitioner.

SUPERIOR COURT.

MONTREAL, Sept. 9, 1881.

Before TORRANCE, J.

DUPRAS ex qual. v. SAUVÉ et al.

Judicial sureties—Contrainte par corps.

Judicial sureties are not entitled to a delay of four months before becoming contraignables par corps.

The demand here was for *contrainte par corps* against judicial sureties.

Doutre, Q.C., for the sureties, alleged, 1st, that there had been no commandment to pay ; and, 2nd, that the four months' delay had not expired. Ord. 1667, Tit. 34, Art. 10 and 11, and the case of *Blais v. Barbeau*, 1 Rev. Crit. 246.

Pagnuelo, Q.C., for plaintiff. There had been commandments to pay by the seizure and sale of movables under an execution. As to the delay of four months, it did not apply.

The Court was with the plaintiff. The code

allowed four months to tutors and curators in default. *Vide* Pothier, Proc. Civ. *Contrainte par Corps*. The reference to *Blais v. Barbeau* was too brief in the *Révue Critique* to allow the Court to appreciate its applicability to the present case.

Petition granted.

Pagnuelo, Q.C., for plaintiff.

Doutre & Joseph for sureties.

SUPERIOR COURT.

MONTREAL, September 14, 1881.

Before TORRANCE, J.

In re REMI GOHIER, insolvent and petitioner for discharge, and PERKINS, assignee, contestant.

Costs of previous contestation—Identity of cause and parties.

Costs due in respect to a former contestation, must be first paid before a petitioner for discharge in insolvency can proceed, where the causes of both proceedings are identical, and the parties are also identical.

PER CURIAM. This was a demand for payment of costs incurred. The petitioner was seeking his discharge in insolvency. Arthur M. Perkins, assignee, appeared in answer to the notice of the application for discharge, and intimated his intention to contest the application, but asked that the costs awarded him, on the contestation of a previous application, be first paid him. The rule is laid down in *Lalonde v. Lalonde*, 1 L. C. Jur. 290. The persons and the cause of action must be identical. It was a pure rule of equity which justified the order, and there appeared to the Court no reason here why the order should not be given. The application was now renewed with better hopes of success, in consequence of the act of Canada, 44 Vic., cap. 27, A.D. 1881, removing a barrier to the discharge which existed previously.

Motion granted.

T. & C. C. Delorimier, for assignee.

R. & L. Laflamme, for petitioner.

CIRCUIT COURT.

MONTREAL, January 26, 1880.

Before MACKAY, J.

DANSEREAU et al., appellants, and THE CORPORATION OF THE PARISH OF ST. ANTOINE, respondents.

Appeal to Circuit Court—Examination of witnesses.

On an appeal to the Circuit Court from the decision of a Municipal Council, revising an assessment roll, the appellants are not entitled to examine witnesses.

PER CURIAM. This appeal is taken from a certain decision pronounced 29th July, 1879, by the Municipal Council of the parish of St. Antoine, sitting in special session, by which it revised and altered the assessment roll then in force in that municipality. The appellants or petitioners did not attend the meeting of 29th July, and nobody there made complaint, written or verbal, against the Council's proceedings or decision. The appellants come to the Circuit Court, therefore, not so much as appellants as complainants; as if the Circuit Court were a Court of first instance they make complaint and ask that the amendments made by the local Council to the assessment roll, whether by adding names to it, or striking off names, be declared irregular, null and void.

Upon the appeal the respondents did not appear, and the appellants were proceeding *ex parte* and had their witnesses in attendance on the 20th and 21st instant, when the respondents asked to be allowed to cross-examine witnesses, at the same time protesting that the Circuit Court could not examine witnesses, none having been examined before the local Council, and no *plainte* having been made before it. (1071, C. Mun.) I allowed the plaintiff's case to be gone into with the examination of all his witnesses in attendance, reserving to pass afterwards upon the question raised by respondents. The plaintiff having concluded his case in chief I can now easily dispose of this appeal.

Upon appeals such as the present one to the Circuit Court, I hold that appellants have not right freely to call and examine witnesses. Art. 1071 is clear as to that. The Circuit Court has not power to administer oath to new witnesses (*nouveaux témoins*). None of the appellants' witnesses examined before me had been examined before. The appellants say that they had not means to make a *plainte* before the local Council, but I do not see this. The amendments were made upon deliberation, and after resolution proposed, and seconded, and agreed to. I see no complaint yet, but the one made in this Circuit Court by the appellants, who did not attend the local Council meeting of July. The appellants do not complain of having been

refused a hearing in the local Council. The articles of the Municipal Code to be considered in this case are 734 to 738 and 746 A. and (as regards particularly appeal) 1061, 1071. The Court has nothing to do with old article 927 of the Municipal Code, repealed in 1878 by the 41-42 Vic., c. 10. Article 927 is to be treated as having never existed; the Municipal Code as it stands to-day is to be read as one settled, original law; under it, from the local council's proceedings altering an assessment roll, the only appeal is to the Circuit Court; but subject to the conditions and limitations enacted, among them those of 1071. It seems to me that appeals are surrounded with difficulties, but these may be diminished by complaints in writing being made early, before the local Councils, and with tender of witnesses. Such complaints and tenders the local Councils would have to attend to. (See last paragraph of 1061, as it now reads.) As to its being almost impossible, in the hurry and suddenness of the proceedings at the local Council's meetings, to formulate complaints, I would say for myself that I would not be exacting as to form, provided the complaint contained a substantive particular protest and complaint, with offers to prove it or support it by proofs, and with names of witnesses and prayer to have them summoned. Holding as I do that I had no right to examine the witnesses who have been examined for appellants, their case fails, and the appeal is dismissed, without costs.

Geoffrion & Co. for appellants.

Lacoste, Globensky & Bisailon for respondents.

SUPERIOR COURT.

MONTREAL, Sept. 9, 1881.

Before TASCHEREAU, J.

DILLON v. CITY OF MONTREAL.

Corporation—Obstruction on sidewalk—Damages.

This was an action against the city of Montreal, by which the plaintiff, a shoemaker, claimed the sum of \$5,000 damages.

It appeared that on the 10th February, 1879, about six o'clock in the evening, while Dillon was going home from work, as he was passing along the north-west side of Notre Dame street, he struck his foot against a lump of snow or ice on the sidewalk, and fell with great violence to the ground. The accident was not attributable to any carelessness on the part of the

plaintiff, but was caused by a dangerous accumulation of ice or snow on the sidewalk. The fall caused fracture of the thigh, and the plaintiff, who was 66 years of age, was permanently weakened and made lame by the effects. The court allowed \$2,000 damages.

The judgment was as follows :—

“ La cour etc....

“ Considérant que le ou vers le 10 février 1879, en la cité de Montréal, le soir et dans l'obscurité, le demandeur passant sur le trottoir qui longe le côté nord-ouest de la rue Notre-Dame de la dite cité, heurta accidentellement du pied, et sans avoir pu l'éviter, une accumulation de neige ou de glace qui se trouvait sur le milieu du dit trottoir, et tomba violemment, la dite chute lui causant une fracture de la cuisse par suite de laquelle le demandeur est depuis resté permanentement infirme et incapable de gagner sa vie ;

“ Considérant que l'obstacle dangereux qui a causé la dite chute du demandeur existait au dit endroit depuis un temps assez considérable, par suite de la négligence de la corporation défenderesse ou de ses employés, et que la défenderesse est passible des dommages réels et continus éprouvés par le demandeur, et qui s'élèvent à au moins \$2000 :

“ Rejette les défenses et condamne la défenderesse à payer au demandeur la dite somme de \$2000, avec intérêt,” &c.

Lacoste, Globensky & Bisailon, for plaintiff.

R. Roy, Q.C., for defendant.

SUPERIOR COURT.

MONTREAL, Sept. 9, 1881.

Before TASCHEREAU, J.

STARR V. McDONALD et al.

Trustee of Church—Letter of guarantee.

This was an action by a livery stable keeper for \$273, amount of an account for hire of horse and buggy, etc. The debt was incurred by one Maynard, and the question was as to the personal responsibility of the two defendants, Messrs. McDonald and James, who were trustees of the Protestant Union Church and school house at Cote St. Luc, for whom Maynard was acting. The demand was based chiefly on the following letter written by the defendants to the plaintiff :

“ MONTREAL, July 27, 1878.

“ DEAR SIR,—By a motion passed at a meeting of the trustees of the Protestant Union Church and school house at Cote St. Luc, it was proposed by Mr. James, seconded by Mr. McDonald, that Mr. Maynard is hereby instructed to open an account with Mr. Starr for hire of horse and buggy, Mr. Starr being requested to include the account already incurred by Mr. Maynard in that against the trustees. In the face of this resolution we hereby request that you will supply Mr. Maynard with a suitable horse and buggy at the rate already agreed upon, the payment of your account being made by the trustees about the middle of September next, when the collection of the subscriptions will be made.”

The letter was signed by the defendants, without any addition to their names.

The defendants pleaded that they were not personally responsible, but one of them, McDonald offered \$60 in settlement of the matter.

The judgment was as follows :—

“ La cour etc....

“ Considérant que les défendeurs n'ont pas encouru de responsabilité personnelle à l'égard du demandeur relativement au compte de ce dernier contre le nommé George Maynard ;

“ Considérant que bien que les défendeurs fussent deux des syndics formant une corporation connue sous le nom de “ The trustees of the Protestant Union Church and School House at Cote St. Luc,” et que la dite corporation syndicale ait garanti le paiement d'une partie de la réclamation du demandeur, les défendeurs ne sont pas par là devenus responsables personnellement envers le demandeur ;

“ Considérant que par leur lettre en date du 27 juillet 1878, les défendeurs n'ont fait que communiquer au demandeur la résolution de la dite corporation à cet égard, et n'ont assumé par la dite lettre aucune obligation personnelle ni donné aucune garantie quelconque ;

“ Considérant qu'en admettant même que les défendeurs soient devenus personnellement responsables, ils ne pourraient l'être que chacun pour une part égale (savoir un cinquième) avec les autres syndics, et sans solidarité ;

“ Considérant que le défendeur Hugh McDonald a offert avant l'action, pour éviter un procès, et a consigné devant cette cour la somme de \$60 ;

"Considérant que par les termes de la dite résolution et de la dite lettre le demandeur ne pourrait réclamer en tout des dits syndics que les articles de son compte antérieurs au mois de septembre 1878, et que la dite somme de \$60, offerte et consignée, fait plus que couvrir les parts réunies des deux défendeurs dans le montant total pour lequel les dits syndics, savoir : les deux défendeurs, et trois autres personnes, seraient responsables envers le demandeur ;

"Maintient les défenses, déclare les offres et la consignation faites en cette cause bonnes, valables et suffisantes, et partant renvoie l'action du demandeur avec dépens," etc.

Kerr, Carter & McGibbon, for the plaintiff.

E. & L. Laflamme, for the defendants.

SUPERIOR COURT.

MONTREAL, Sept. 9, 1881.

Before TASCHEREAU, J.

BANK OF MONTREAL V. RANKIN.

Cheque—Overdraft—Stamps.

This was an action for the amount of a cheque.

On the 21st October, 1879, the defendant gave his cheque on the Bank of Montreal for \$20,689.85, payable to bearer. It was presented the same day, and on presentation the Bank paid the money. The defendant had not at the time a sufficient sum on deposit to cover the cheque, but the Bank paid the full amount, and entered it to the debit of defendant in a special account.

The defence to the action was, first, that the order in question was not really a cheque, not being against money on deposit, but was in the nature of a note, and was invalid without stamps. Want of consideration was also pleaded. And, further, that the cheque was given as a compromise of a criminal prosecution brought against defendant and six other directors of the Consolidated Bank, for making false and fraudulent returns; that the Bank paid the money to Mr. John Monk and his representative, Mr. Ritchie, who were bringing the prosecution, and that this took place with full knowledge by the Bank of all the facts, and that they could not recover on the cheque.

The Court found that the money was paid under the circumstances above stated, but the Bank had no knowledge of the alleged compromise. The personal knowledge of the President, Mr.

George Stephen, of the circumstances of the compromise could not be opposed to the Bank, as the latter was not bound by the acts of Mr. Stephen in his individual capacity, and had no cognizance of the pretended compromise at the time the money was paid. As to the alleged necessity for stamps on the cheque, the Court did not consider the pretension tenable. Every order in writing on a bank for the payment of money is a cheque, and as such did not require to be stamped. The pleas of the defendant must be overruled, and judgment must go in favor of plaintiff for \$20,689.85.

The judgment is as follows :

"La cour dit : . . .

"Considérant que tout ordre par écrit sur une banque pour le paiement d'une somme d'argent, en chèques, et comme tel n'est pas assujéti à la nécessité d'être timbré ;

"Considérant que le mandat à ordre allégué en l'action est un chèque qui n'avait pas besoin, pour sa validité, d'être revêtu d'un timbre ;

"Considérant que les allégations de l'action sont suffisantes en loi ;

"Renvoie et rejette la dite exception à la forme avec dépens.

"Et procédant à adjuger sur le mérite de la cause ;

"Considérant que le 21 Octobre 1879, le défendeur a émis son chèque ou mandat à ordre sur la demanderesse pour le paiement de la somme de \$20,689.85, payable au porteur du dit chèque, et que sur présentation d'icelui le même jour, la demanderesse payait la dite somme au porteur du dit chèque et la porta au débit du défendeur ;

"Considérant que le dit jour le défendeur n'avait pas à la dite banque demanderesse un dépôt suffisant pour couvrir tout le montant du dit chèque, mais qu'à sa demande spéciale, la demanderesse payait tout le dit montant, lequel montant elle a subseqüemment, encore à la demande du défendeur, entré dans ses livres au débit de ce dernier, dans un compte spécial ;

"Considérant que le dit chèque a été par la dite banque remis au défendeur qui l'a produit avec ses défenses ;

"Considérant que la dite banque a payé le montant du dit chèque dans le cours ordinaire de ses opérations journalières de banque, de bonne foi et dans l'ignorance de la destination du produit du dit chèque ;

"Considérant que le défendeur n'a aucunement prouvé la participation de la banque demanderesse dans le prétendu compromis allégué avoir eu lieu entre le dit défendeur et le nommé John Monk ou ses agents, en exécution duquel le dit chèque aurait été émis, et qui aurait été entaché d'illégalité et de nullité, d'après les défenses ;

"Considérant que la connaissance personnelle que le nommé George Stephen, Président de la dite Banque, a pu avoir du dit prétendu compromis, ne peut être opposée à la demanderesse, qui n'est pas liée par les actes du dit Stephen, et qui ne les connaissait pas lors du paiement du dit chèque ;

"Considérant que quelque soit la nature et le caractère du dit compromis, il ne peut aucunement être opposé à la demanderesse ni l'empêcher de recouvrer la dite somme de \$20,689.85 ;

"Rejette les défenses, et condamne le défendeur à payer à la demanderesse la dite somme de \$20,679.85 avec intérêt à compter du 21 Octobre 1879, et les dépens."

W. F. Ritchie, for plaintiff.

Girouard & Wurtelle, for defendant.

W. H. Kerr, Q.C., counsel.

COROUT OF QUEEN'S BENCH.

[In Chambers.]

Before MONK, J.

Ex parte GUSTAVE CHEREL, petitioner for writ of Habeas Corpus.

Summary conviction—32-33 Vict. c. 32, s. 17—
Sentence.

In cases tried under 32-33 Vict. c. 32, s. 2, ss. 3, 4, 5 and 6, if the prisoner be condemned to fine and imprisonment, hard labor may be added to the sentence of imprisonment.

Le requérant avait été condamné par M. le Recorder de Montigny (sur conviction d'avoir tenu, sur la rue Vitré, à Montréal, une maison de prostitution), 1o à un emprisonnement de six mois aux travaux forcés ; 2o à une amende de cent dollars, y compris les frais, et 3o à un emprisonnement additionnel de six mois, sans travaux forcés, si cette amende n'était pas payée à l'expiration du terme en premier lieu mentionné.

Le requérant avait subi son procès en vertu du chapitre 32 de l'acte de 1869 (32-33 Victoria) sec. 2, sous sec. 6. Il avait été condamné en

vertu de la section 17 du même acte, laquelle permet au magistrat devant qui la cause a été instruite et qui trouve l'accusation fondée, de condamner l'accusé et l'incarcérer dans la prison commune ou autre lieu de détention, pour y être détenu "avec ou sans travaux forcés," pour une période de pas plus de six mois, ou à payer une amende n'excédant pas, avec les frais, la somme de cent piastres, "ou à une amende et un emprisonnement" n'excédant pas la période et la somme susdites.

M. A. P. Globensky, avocat du requérant, prétendait, en s'appuyant sur un jugement rendu par Son Honneur le juge Ramsay (*re May Somers*, terme criminel de septembre 1875, à Montréal) que les mots "avec ou sans travaux forcés" auraient dû être répétés après le mot "emprisonnement," dans la dernière partie de la clause ; qu'au moins on aurait dû expliquer clairement que l'emprisonnement en dernier lieu mentionné devait être de la même nature que celui en premier lieu indiqué ; que le statut devait être interprété strictement et ne pas permettre le sous-entendu : que l'emprisonnement tel que prévu par le législateur, s'entendait, en langage légal, sans travaux forcés : que le Recorder, en imposant les travaux forcés, avait excédé sa juridiction : que par conséquent la conviction rendue par lui, et le *commitment* émis en vertu d'icelle, étaient nuls, devaient être cassés et le requérant remis en liberté.

M. Aldéric Ouimet, C.R., pour la Couronne, soutint que les procédés du Recorder étaient parfaitement réguliers sous tous les rapports. Il est évident, dit-il, que le législateur n'a pu avoir en vue, en déclarant que le magistrat pouvait condamner et à l'amende et à l'emprisonnement, un autre mode de punition que celui déjà mentionné à quelques lignes d'intervalle plus haut dans la même clause : que l'espèce d'emprisonnement pourvu, était aux travaux forcés, ou sans travaux forcés, à la discrétion du magistrat. Il fallait lire le statut criminel, comme les statuts civils, et leur donner une interprétation que la loi, qui voulait punir le genre d'offense commis par le requérant, d'une façon exemplaire, avait eu en vue. A l'appui de sa proposition, M. Ouimet produisit plusieurs autorités tant anglaises que canadiennes, sur la question d'interprétation des statuts. Il fit aussi allusion à la cause de *Williams* rapportée dans le 19e volume du *Jurist*, dans laquelle une question de ce genre avait été

soulevée, et décidée par la Cour d'Appel, dans un sens contraire aux prétentions du requérant. Il termina par quelques remarques sur la gravité de l'offense commise et la nécessité de mettre un frein à des crimes du même genre.

Le tribunal après avoir délibéré sérieusement sur la demande du requérant, rendit son jugement. L'Honorable juge Monk, parlant en son nom et en celui de ses honorables collègues, déclara que les juges présents étaient unanimes à décider que les procédés du Recorder étaient complètement en règle, que celui-ci avait le droit, d'après la clause 17 du chapitre 32 de l'acte de 1869, d'ordonner l'emprisonnement avec ou sans travaux forcés, que la demande du requérant devait être rejetée, le writ d'*habeas corpus* cassé, et Gustave Chérel remis entre les mains du geôlier, pour subir la peine à laquelle il avait été condamné.

L'honorable juge fit connaître toutes les difficultés qui surgissaient dans l'interprétation d'une telle clause. Il a signalé les jugements dans la cause de Williams et dans celle de Somers. Dans le premier une disposition à peu près identique, contenue dans un statut postérieur, a une autre disposition avec laquelle elle était déclarée comprendre les travaux forcés par trois sur cinq juges de la Cour du banc de la Reine. Lui et l'honorable juge Ramsay ont différé de la majorité composée des honorables juge-en-chef, Sanborn et Taschereau.

Mais la conciliation des deux textes de loi mis en question dans la cause de Williams est réellement plus difficile que dans ce cas présent, où la disposition à interpréter est dans la même section que celle avec laquelle il s'agit de la concilier. La version anglaise—or to both fine and imprisonment, not exceeding the said period and sum—ne laisse pas de doute que le législateur a entendu infliger le même mode d'emprisonnement, dont il a parlé plus haut, surtout quand on le compare à ceux infligés pour la même offense dans le chap. 28 qui est le statut définissant l'offense en question.

A. P. Globensky, for the petitioner.

Aldéric Ouimet, Q.C., for the Crown.

RECENT ENGLISH DECISIONS.

Criminal law—Forgery—Inchoate instrument.—

The prisoner was indicted in the first count for forging and uttering an indorsement on a bill of exchange, in the second count on a paper

writing in the form of and purporting to be a bill of exchange, and in the third count on a certain paper writing. The facts were these: The prosecutor wrote the body of a bill of exchange, but without signing the drawer's name, and sent it to the prisoner, who was to accept it and procure an indorsement by a solvent person, and return it to the prosecutor. The prisoner accepted it, and forged the indorsement of another person's name, and returned it. *Held*, that the prisoner could not be convicted upon this indictment, as the document was only an inchoate instrument of no value when the prisoner forged the indorsement. Cases cited: *McCall v. Taylor*, 34 L. J. 365; *Stoessiger v. South-East R. Co.*, 3 El. & B. 549. *Crown Cas. Res.*, May 21, 1881. *Regina v. Harper*. Opinion by Lord Coleridge, C.J., 44 L. T. Rep. (N.S.) 615.

Collision—Compulsory Pilotage.—A tug belonging to the respondent was engaged to tow a ship belonging to the appellants to harbor. The ship was in charge of a pilot compulsorily employed. The tug attempted to tow the ship across a bank, instead of going round it, and the ship struck on the bank and sustained damage. In an action brought by the shipowners against the owner of the tug, it was proved that the pilot signalled to the tug to change her course, but did not cast off the tow rope on finding his signals disregarded, and in the opinion of the nautical assessors he was "negligent, supine and inactive." *Held* (reversing the judgment of the court below), that this did not amount to contributory negligence on the part of the ship, and that her owners were entitled to recover for the damage sustained. *The Julia*, Lush. 224; 14 Moo. P. C. 210, approved. Other cases cited, *The Diana*, 1 W. Rob. 131; *The Duke of Manchester*, 2id. 470; *The Clyde Navigation Co. v. Barclay*, 1 App. Cas. 790; 36 L. T. Rep. (N. S.) 379; *Bland v. Ross*, 14 Moo. P. C. 210; *Quarman v. Burnett*, 6 M. & W. 509; *Smith v. St. Lawrence Tow Boat Co.*, L. R., 5 P. C. 308; 28 L. T. Rep. (N. S.) 885; *The Energy*, L. R., 3 A. & E. 48; 23 L. T. Rep. (N. S.) 601; *Thorogood v. Bryan*, 5 C. B. 115; *Davis v. Mann*, 10 M. & W. 546; *Ashby v. White*, Sm. Lead. Cas. 300. House of Lords, March 7, 1881. *Spaight v. Tedcastle*. Opinion by Lord Chancellor Selborne, 44 L. T. Rep. (N. S.) 589.

The Legal News.

VOL. IV. SEPTEMBER 24, 1881. No. 39.

THE ENGLISH BENCH.

The retirement of Lord Justice Bramwell, formerly a judge of the Court of Exchequer, is noticed in the cable despatches. The rapidity of the changes on the English bench within the last dozen years has excited some remark. Within twelve years every judge on the common law side has died, retired, or been promoted. In the Queen's Bench, Lord Chief Justice Cockburn and Justices Shee and Quain have died; Justice Blackburn has become Lord Blackburn, Justice Lush has become a Lord Justice, Sir John Mellor has retired, and Sir James Hannen has gone to the Divorce Court. In the Exchequer, Chief Baron Kelly and Barons Channell, Pig-gott and Cleasby have died; Baron Bramwell has become a Lord Justice and has now retired. Baron Martin has also retired. In the Common Pleas, Chief Justice Earl has retired, Chief Justice Bovill and Justices Willes, Keating, Honyman, and Archibald have died. Mr. Justice Brett has become a Lord Justice, Mr. Justice Byles has retired, and Justice Montague Smith has been transferred to the Privy Council. On the Equity side, Lords Chelmsford, Westbury, Cranworth and Hatherley, ex-Lords Chancellors, have died, Lords Justices Turner, Knight-Bruce, Bolt, Giffard, James and Thesiger have died. Lord Romilly, Master of the Rolls, has also died. Vice Chancellors Stuart, Kindersley and Malins have retired, and Vice Chancellor Wickens has died. Sir James W. Colville, of the Judicial Committee, is also among the departed.

ENCOURAGING MURDER OF FOREIGN POTENTATES.

We give up a portion of our space this week to a very interesting case, *Reg. v. Most*, before the Criminal Court of Appeal in England, on a point reserved by Lord Chief Justice Coleridge. It has been decided that a newspaper article inciting to and encouraging the murder of foreign sovereigns comes within the statute, without proof that it was read by or influenced any particular person. The whole case, which

has been very fully examined by the learned judges, is of interest in these times, when so many persons seem to be desirous of procuring the assassination or removal of crowned personages and others in authority.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, September 19, 1881.

Before TORRANCE, J.

Ex parte RADIGER, petitioner for certiorari, and HAWKINS, and BEAUDRY, respondent.

Commissioners Courts—Recusation.

Commissioners of Commissioners' Courts may be recused like other judges. A judgment rendered by a commissioner personally interested in the suit, will be annulled, though the ground of recusation was not invoked at the trial. Commissioners are bound to take notes of the evidence in writing.

This was a motion to quash a judgment of the Commissioners' Court at Hochelaga.

"The Court having heard the plaintiff and the defendant in this cause, and having examined the proof and the proceedings, and deliberated thereon, condemned the said defendant to pay to the said plaintiff the sum of \$5 cy. amount of debt, and \$1.70 amount of costs." The objection taken by petitioner, was that the commissioner sitting was interested in the litigation, being himself responsible to plaintiff for the amount. This interest was established by affidavit and not denied.

PER CURIAM. By C. C. P. 1185, 6, these commissioners may be recused like other judges, and the recusation must be in writing, and by C. C. P. 177, interest is a disqualification, and the party having a right to recuse may renounce his right save and except the case in C. C. P. 177, namely the disqualification of interest, which cannot be waived. No such recusation was made here though the ground must have been known, and art. 180 says, that a party aware of the ground is bound to make it known as soon as it comes to his knowledge. On this ground therefore the Court thinks that the judgment should be set aside. Vide also Paley, *Convictions*, pp. 38, 9. There is another consideration. There are no notes of the evidence given before the commissioner, and the Act creating these courts, does not exempt them from taking notes of

evidence, as the Circuit Court is exempted in non-appealable cases, C. C. P. 1101. In the case of justices of the peace in England making summary convictions, the justices are expected and enjoined to take notes of evidence: Chitty's Burn's Justice vo. Conviction 833 and 840, edition of 1831: Paley, Convictions, p. 117, ed. 1866: Kerr's Magistrates' Acts, p. 181.

Next as to costs: The question of costs is in the discretion of the Court. At the trial in the Commissioners Court, the defendant does not appear to have recused the judge. The debt is probably due to the plaintiff, Beaudry, who may still claim it, and the Court thinks here that the plaintiff should not be condemned in costs.

Judgment annulled.

Geoffrion & Co. for petitioner.

Judah & Branchaud for Beaudry.

SUPERIOR COURT.

MONTREAL, Sept. 19, 1881.

Before TORRANCE, J.

PERRAS V. GOYETTE, père.

Writ of Summons—Amendment.

The Court will allow a writ, which, by inadvertence, was not signed by the prothonotary, to be amended by adding the signature of that officer, after an exception à la forme has been filed.

This was a motion by plaintiff to amend the writ of summons and declaration after the filing of an exception à la forme by defendant. The writ served upon the defendant and the original were by inadvertence given out of the office of the prothonotary, without the signature of the prothonotary. The defendant availed himself of this informality by filing an exception à la forme, relying upon C. C. P. 46, 51, which require the formality of the signature on pain of nullity. The plaintiff moved for an order upon the prothonotary to affix his signature, on payment of costs of exception, and that plaintiff be permitted to serve upon defendant a correct copy of writ and declaration.

The Court, after conference with Caron, Rainville, Papineau and Jette, JJ., granted the motion subject to the payment of costs.

C. A. Cornslier for plaintiff.

Préfontaine for defendant.

SUPRIOR COURT.

MONTREAL, Sept. 17, 1881.

Before TORRANCE, J.

CHEVALLIER V. CUVILLIER et al.

Costs—Demurrer maintained as to part of demand.

Where a demurrer is maintained as to part of the demand, the attorney is entitled to the same fee as on demurrer dismissed.

This was a motion by plaintiff to revise the taxation of a bill of costs in favor of defendants.

The defendants had demurred to a large portion of the demand of plaintiff, (over \$150,000) and the demurrer had been maintained to this portion with costs. The prothonotary had allowed a full bill of costs on the demurrer as if the action had been dismissed. The tariff had made no provision for this particular case, in which after the demurrer was maintained a portion of the demand remained intact. There was no fee mentioned in the tariff for the case of a demurrer maintained, though there was for a demurrer dismissed, apart from the case of an action dismissed.

The Judge reduced the fee to \$8, being the amount allowed for a demurrer dismissed, seeing the judgment gave costs, and the action was not dismissed.

Doutre & Joseph for plaintiff.

Barnard, Beauchamp & Creighton for defendants.

NEWSPAPER ARTICLE ENCOURAGING MURDER OF FOREIGN POTENTATES.

CROWN CASES RESERVED. JUNE 13, 1881.

REGINA V. MOST, 44 L. T. Rep. (N.S.) 823.

The defendant wrote and published an article in a newspaper in London, which was sold to the public and also circulated among subscribers, which article the jury found was intended to and did encourage, and was an endeavor to persuade persons to murder foreign potentates, and that such encouragement and endeavoring to persuade was the natural and reasonable effect of the article. *Held*, that the defendant was guilty of a misdemeanor within section 4 of the 24 and 25 Vict., ch. 100, which makes it a misdemeanor to endeavor to persuade a person to murder any other person.

Case reserved for the opinion of this court by Lord Coleridge, C. J.

Johann Most was tried before me at the Central Criminal Court on the 25th May, on an indictment containing twelve counts. The first two counts contained charges of publishing a

scandalous libel at common law; and on these counts a separate verdict of guilty was taken, and no question arises upon them.

The remaining ten counts charged the prisoner with offending against 24 and 25 Vic., ch. 100, § 4. The subject-matter of all the counts was the same publication, which was treated as a common-law libel in the first two counts, and as an offence against the statute in the remaining ten. It was an article written in German in a newspaper entirely in that language, but published weekly in London, and enjoying an average circulation of 1,200 copies. The prisoner was proved to be the editor and publisher of the paper. Several copies of the paper were proved to have been bought at his house, and some copies of a reprint of the article in question were actually sold by the prisoner himself to one of the witnesses called on behalf of the Crown.

It is not necessary to set out the article at length, but it contained amongst others the following passages:

"Like a thunderclap it penetrated into princely palaces where dwell those crime-bladen abortions of every profligacy who long since have earned a similar fate a thousand-fold."

"Nay, just in the most recent period they whispered with gratification in each others' ears that all danger was over, because the most energetic of all tyrant-haters the 'Russian Nihilists,' had been successfully exterminated, to the last member."

"Then comes such a hit."

"William, erewhile Cannister-shot Prince of Prussia, the new Protestant Pope and soldier, emperor of Germany, got convulsions in due form from excitement. Like things happened at other courts."

"At the same time they all know that every success has the wonderful power, not only of instilling respect, but also of inciting to imitation. There they simply tremble then from Constantinople to Washington for their long since forfeited heads."

"When in many countries old women only, and little children yet limp about the political stage with tears in their eyes, with the most loathsome fear in their bosoms of the castigating rod of the State night watchman, now, when real heroes have become so scarce, such a Brutus deed has the same effect on better natures as a refreshing storm."

"To be sure it will happen once again that

here and there even Socialists start up, who, without that any one asks them, assert that they for their part abominate regicide, because such an one after all does no good, and because they are combating not persons but institutions. This sophistry is so gross that it may be confuted in a single sentence. It is clear, namely, even to a mere political tyro, that State and social institutions cannot be got rid of until one has overcome the persons who wish to maintain the same. With mere philosophy you cannot so much as drive a sparrow from a cherry tree, any more than bees are rid of their drones by simple humming.

"On the other hand, it is altogether false that the destruction of a prince is entirely without value, because a substitute appointed beforehand forthwith takes his place."

"What one might in any case complain of, that is only the rarity of so-called tyrannicide. If only a single crowned wretch were disposed of every month, in a short time it should afford no one gratification henceforward still to play the monarch."

"But it is said, 'will the successor of the smashed one do any better than he did? We know it not. But this we do know, that the same can hardly be permitted to reign long if he only steps in his father's footsteps.'"

Meanwhile, be this as it may, the throw was good; and we hope that it was not the last.

"May the bold deed, which, we repeat it, has our full sympathy, inspire revolutionists far and wide with fresh courage."

The 4th section of 24 and 25 Vict., ch. 100, is as follows: All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of her majesty or not, and whether he be within the queen's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavor to persuade, or shall propose to any person to murder any other person, whether he be a subject of her majesty or not, and whether he be within the queen's dominions or not, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not more than ten and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor.

The ten counts framed upon this section all charged the prisoner with having "encouraged" or "endeavored to persuade" persons to "murder other persons," some named and others not named, who were in all cases not subjects of

her majesty, nor within the queen's dominions.

The 3d and the 9th counts, so far as material to the present question, were as follows (they may be taken as specimens of the other counts, which were in their legal incidents the same) :

"Count 3. And the jurors aforesaid, upon their oath aforesaid, further present that heretofore, to wit, on the 19th day of March, in the year of Our Lord 1881, the said Johann Most unlawfully, knowingly, wilfully and wickedly did encourage certain persons, whose names to the jurors aforesaid are unknown, to murder certain other persons, to wit, the sovereigns and rulers of Europe, not then being within the dominions of our said lady the queen, and not being subjects of our said lady the queen, against the form of the statute in that case made and provided, and against the peace of our said lady the queen, her crown and dignity."

"Count 9. And the jurors aforesaid, upon their oath aforesaid, further present that heretofore, to wit, on the 19th day of March, in the year of Our Lord 1881, the said Johann Most unlawfully, knowingly, wilfully and wickedly did encourage certain persons, whose names are to the jurors aforesaid unknown, to murder a certain other person, to wit, His Imperial Majesty Alexander the Third, Emperor of all the Russias, not then being within the dominions of our said lady the queen, and not being a subject of our said lady the queen, against the form of the statute in that case made and provided, and against the peace of our said lady the queen, her crown and dignity."

The evidence in support of these counts was the same as that in support of the first and second counts; and the only encouragement and endeavor to persuade proved was the publication of the libel.

I directed the jury that if they thought that by the publication of the article the defendant did intend to and did encourage or endeavor to persuade any person to murder any other person, whether a subject of her majesty or not, and whether within the queen's dominions or not, and that such encouragement and endeavoring to persuade was the natural and reasonable effect of the article, they should find the prisoner guilty upon the last ten counts, or such of them as they thought the evidence supported. The jury convicted the prisoner upon

all the ten counts, and there was abundant evidence to justify them if my direction was correct.

Entertaining, however, some doubt as to the correctness of my direction, I deferred sentencing the prisoner, and I have now to request the opinion of the Court of Criminal Appeal whether such direction was correct in point of law or not.

If the Court of Appeal thinks the direction correct, the conviction on those ten counts is to be affirmed; if otherwise, the conviction on those ten counts is to be quashed.

A. M. Sullivan, for the prisoner.

The *Attorney-General (Poland and A. L. Smith with him)* for the prosecution.

LORD COLERIDGE, C. J. I am of opinion that this conviction should be affirmed. The question arises upon section 4 of 24 and 25 Vict., ch. 100, which enacts that "all persons who shall, or any one who shall"—I leave out the unnecessary words—"encourage, or who shall endeavor to persuade any person to murder any other person, whether a subject of the queen's, or within the queen's dominions, or not, shall be guilty of a misdemeanor." Now the doubt that arose in my mind was whether the words of this section were satisfied by publication broadcast, of that which, if directed *ore tenus* to a particular individual, or *ore tenus* to a great number of individuals, or by writing to a particular individual or a great number of individuals, would undoubtedly have been within the words of the section. On consideration, I think that doubt was not well founded; indeed, all doubt has been entirely cleared away by the argument which I have heard this morning. I do not think it necessary to pursue the inquiry, however interesting it may be, as to the history of this clause. It is said that the words are copied from the Irish statutes of 1796 and 1798 (36 Geo. 3, ch. 27; 38 Geo. 3, ch. 57). It may be that they are, but as has been truly observed, we have not to do with the history of the words, unless the words in the statute are doubtful, and require historical investigation to explain them. If the words are really and fairly doubtful, then, according to well known legal principles, and principles of common sense, historical investigation may be used for the purpose of clearing away the doubt which the phraseology of the statute creates.

But upon looking at these words I think there is no such doubt created by the phraseology. We have to deal here with a publication proved by the evidence at the trial to have been written by the defendant, to have been printed by the defendant, that is, he ordered and paid for the printing of it, sold by the defendant, called by the defendant his article, and intended, as the jury have found, and most reasonably found, to be read by the twelve hundred or more persons who were subscribers to or the purchasers of the *Freiheit* newspaper; and further we have to deal with an article which the jury have found, and I am of opinion have rightly found, to be naturally and reasonably intended to incite and encourage, and persuade or to endeavour to persuade persons who should read that article to the murder either of the Emperor Alexander or the Emperor William, or in the alternative the crowned and uncrowned heads of States, as it is expressed in one part of the article, from Constantinople to Washington. The question therefore simply is on those facts, which are undisputed, and with regard to which the jury have pronounced their opinion—Do those facts bring it within these words? I am of opinion they clearly do. An endeavour to persuade or an encouragement is none the less an endeavour to persuade or an encouragement, because the person who so encourages or endeavors to persuade, does not, in the particular act of encouragement or persuasion, personally address the one or more persons whom the address which contains the encouragement or the endeavour to persuade reaches. The argument has been well put that an orator who makes a speech to two thousand people does not address it to any one individual amongst those two thousand; it is addressed to the whole number. It is endeavoring to persuade the whole number or large portions of that number, and if a particular individual amongst that number addressed by the orator is persuaded, or listens to it and is encouraged, it is plain that the words of this statute are complied with; because, according to well-known principles of law, the person who addresses those words to a number of persons must be taken to address them to the persons who he knows hear them, who he knows will understand them in a particular way, do understand them in that particular way, and do act upon them. For that purpose the case which was

suggested by my brother Williams, and was mentioned by me to Mr. Sullivan just now—the case of *Gerhard v. Bates*, 2 E. & B. 476; 22 L. J. 364, Q. B.—is an authority. There are authorities to be found elsewhere to the same effect, that a circular addressed to the public, containing false statements, reaching one of them as one of the public, not as an individual picked out, but as one of the public, who is influenced by the statements in that circular to his disadvantage, and who is injured by them, may afford good ground for a personal action for damages occasioned by the statements in that circular against the person who has issued it to the public, the reason being that the recipient of the circular is one amongst the number of persons to whom it is issued, and he has been injured by the statements contained in it. It seems to me that this is not the less an endeavor to persuade or an encouragement to murder, either named individuals or unnamed individuals, because it is under another aspect of the law a seditious and scandalous libel. On the whole, I am clearly of opinion, on the words of the statute and upon the authorities—the only authorities which have been cited appeared to me to be against Mr. Sullivan—that the direction given at the trial is correct, and the conviction right and proper to be affirmed.

GAOZE, J. I am of the same opinion. The words of the act, so far as they are material to this case are, "Whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person to murder any other person, whether he be a subject of her majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanor;" etc. Now, I think there can be no doubt that those words taken alone, for reasons which I will presently give, apply, at all events, to more than one particular person. I do not think it would be argued that if a person instead of encouraging or endeavoring to persuade one person, endeavored to persuade two persons, or three persons, that would not be within the act; because in endeavoring to persuade two or three persons, he endeavors to persuade each of those two or three persons. Then, to go a step further, supposing he addresses eight or ten persons, and says: "Now I recommend any one of you who has the courage to do it, to murder so and so, and you will gain so and so by it," or uses

other words by way of argument or by way of promise to induce some one or more of those persons to murder another, surely that would be encouraging a person or persons—that is, each and every one of those persons to murder. Then, supposing it is not done by word of mouth—supposing a person writes a letter—to an individual person to murder the Emperor of Russia, can it be said that that is not wholly within the words of this section? It appears to me it is absolutely within them. It is a direct encouragement to a person to murder the Emperor of Russia. Then, if he goes further, and instead of writing one letter, he writes ten or twenty letters, and distributes them to persons whom he thinks they may have an effect upon, or the first twenty who come, does not he then encourage each of those persons to commit murder? Then, to go a step further, if he prints a circular of the same character as a letter, and hands that to twenty or more than twenty persons, is not that an encouragement to every one of those twenty persons to commit a murder? Does he lessen the offence by increasing the number of persons to whom he publishes or transmits this encouragement? Then, can it be said that the printing of a paper and circulating it to a definite body of subscribers, as was done here, or to all the world, is not an encouraging within the section? It is beyond my comprehension to see that that can alter the matter at all. It seems to me, first, that it is clearly within the words of the statute; and secondly, that so far from extenuating—I do not mean in the sense of punishment, but diluting the offence—it increases it, because he not only endeavors to persuade a person to commit the offence, but a considerable number of different persons, into whose hands the paper may fall. It appears to me therefore that it is literally and clearly within the words of the statute, which are “persuade any person,” and it does not the less do that because it persuades, or endeavors to persuade or encourages, separately, a considerable number of persons. Then, there is another argument of Mr. Sullivan’s which is, as I understand it, that this section is to some extent the same—the words are almost the same—as the previous Irish act of 38 Geo. 3, ch. 57, which was an addition to or an amendment of a previous Irish act (36 Geo. 3, ch. 27) relating to conspiracies. There

is no doubt that the act of 38 Geo. 3, does primarily, by the preamble, appear to relate to conspiracies, because, after reciting the previous Irish act of 36 Geo. 3, ch. 27, whereby it was enacted that persons who should by course of law be convicted of conspiring, confederating or agreeing to murder a person should be adjudged felons, it goes on to a second recital: “And whereas the said recited act hath been found ineffectual for the punishment of the crimes of proposing to, soliciting and persuading others to enter into and engage in such conspiracies, be it therefore enacted that any person or persons who shall propose to, solicit, encourage, persuade, or endeavour to encourage or persuade any person or persons to murder any person, and shall be thereof by due course of law convicted,” etc. Now, there the word “conspiracy” does not occur, although it occurs in the preamble. Then Mr. Sullivan’s argument, as I understand it, is that we are not to hold that the statute 24 & 25 Vict., ch. 100, sec. 4, applies, unless there is a conspiracy, that is, unless there are two minds brought to bear on the subject. But the statute does not so state. The ineffectual character of the previous statute is recited, and in order to remedy its defects the statute of which I am speaking is expressed to be enacted. But I do not require in truth to inquire into the meaning of the Irish statute, because the words of the statute on which this conviction went are perfectly clear. There is no such recital therein as the second recital in the Irish statute I have alluded to; but section 4 of 24 and 25 Vict., ch. 100, after having dealt with the question of a conspiracy clearly in the first clause of it, goes on, “and whosoever shall solicit, encourage, persuade or endeavour to persuade, or shall propose to any person to murder any other person, whether he be a subject of her majesty or not, and whether he be within the Queen’s dominions or not, shall be guilty of a misdemeanor.” There the act severs and contradistinguishes, if I may say so, the two offences—the conspiring on the one hand, and the encouraging or endeavoring to persuade on the other hand. The law has said no doubt that in construing an act of Parliament where the words are ambiguous and point to a remedy which a previous statute has pointed to, you may look to the previous statute to see the meaning, and to see what the object

sought is, and to fairly construe it; but here not only is there no ambiguity, but to my mind we are clearly told what the statute intends. Then, as to the evidence, there is ample evidence here not only of circulation to a number of persons, each of whom might be affected, but there is evidence that one person was actually proved to have received the publication, and he might fairly be said to be "a person" just as much as if a letter containing the article had been handed him for his perusal. I do not think proof of such receipt by a particular person necessary, but if it be necessary there is evidence of it. Therefore there was ample evidence to support the conviction, the direction was sufficient, and there is nothing here to enable me to say that the conviction should be quashed.

DENMAN, J. It was fairly and candidly admitted by Mr. Sullivan in the course of his able argument that the sole question in this case is whether there was, upon the facts which are here stated, evidence to go to the jury that the defendant was brought within section 4 of 24 and 25 Vict. ch. 100. And upon this point it was said for the defendant that it was not made out that he had encouraged or endeavored to persuade any person to murder any other person. With regard to murdering any other person, that point was not reserved. I think there was nothing to reserve about it, because I should draw the same conclusion which the jury did from the document itself, that it did contain an encouragement or an endeavor to persuade to murder the particular persons, whose names are mentioned in it. But it is out of the case, and the only question is whether the words "any person" are met by the evidence in this case. Now, I must own that if that question had been for the first time raised before me, as it was before my lord upon the trial, my impression is strong, looking at the importance of the case, and looking at the fact of the absence of any authority upon it in our courts or bearing upon it in our courts, I should, as my lord did, have thought it a proper case to reserve for the consideration of the Court of Criminal Appeal, and I am glad he did so; but the question having been reserved, we have to consider whether there was here evidence to meet that part of the case. I think there was. The contention was that the statute did not in-

tend to meet the case of a libel of this character, circulated, as libels are circulated, simply by the publication of a paper, and sending it to the subscribers, or allowing it to be circulated amongst the population. I agree with my lord entirely, and I am glad that he now feels that there is no doubt about it, and that though this may be a mere publication of a libel, still if it is the publication of a libel, and the libel does in itself amount to an endeavor to persuade all persons to whom it is sent to commit a murder, nevertheless it is doing an act intended to be legislated against by this clause, making it a misdemeanor of another character—a misdemeanor punishable by a more severe punishment than the circulation of a libel of an ordinary character would be. The doubt which I should have felt, probably, if it had come before me, was a doubt in accordance with Mr. Sullivan's argument whether the words "any person" might not mean some definite person; whether some definite person might not have been required to be proved. I should however have thought that if it had been made out that the libel had been circulated to a certain set of persons whose identity was easily ascertained, except only that their names were unknown, that then, *quacunqve viâ*, the clause would have been fulfilled, even though Mr. Sullivan's contention were a good contention. I do not think it a good contention; I think the circulation to the world, to multitudes of persons wholly undefined and to whom it would come, would be sufficient; but what I wish to add is this, that even if the other construction were the true one, I think it is important to observe in this case I should have been prepared to support the conviction on this ground—that many of these persons were, in that sense, definite persons. They were known subscribers in large numbers to this newspaper, and the man who edited the newspaper, the man who wrote the article, the man who sold the newspaper and caused it to be distributed, did know that that newspaper would, in the ordinary course, come to his regular subscribers at all events, whether it went to a larger number of persons, or whether it did not. Therefore, supposing it were necessary that the persons unknown should be in this case definite persons, ascertainable persons, persons who might be ascertained by inquiry, although unknown to the jurors at the time of their finding, I should have thought that in that sense the indictment was supported by the evidence.

HUDDLESTON, B. The question for our consideration, submitted to us by the lord chief justice, is whether his direction was correct in

point of law, and that direction is this—he told the jury that if they thought that by the publication of the article the defendant did intend to and did encourage, or endeavor to persuade any person to murder any other person, whether the subject of her majesty or not, and whether within the queen's dominions or not, and that such encouragement and endeavor to persuade was the natural and reasonable effect of the article, they should find the prisoner guilty. That was the charge of the lord chief justice, and that is what we are to consider—whether it is correct or not. Now I do not entertain the slightest doubt that that was really the only question that could be left to the jury. The evidence was ample to warrant the finding of the jury, and the only thing that could be left to the jury was to say, “Do you think that by the publication of this article the defendant did intend to encourage or endeavor to persuade any person to murder, and is not the necessary and legal consequence, the reasonable effect of the article, to induce any person to do so?” Now that charge is founded directly on the words of the statute, and if you look at these words, the distinction which Mr. Sullivan has endeavored to draw with reference to conspiracy really does not arise; because the section of the statute contemplates two classes of cases—it contemplates one class where there is a conspiracy and another class of cases where there is individual action. The first class of cases in the section is that all persons who shall conspire to that effect shall be guilty of a misdemeanor. The second class of cases is the individual, “whosoever” shall do certain acts, and it is remarkable to see the words which the Legislature have used for the purpose of pointing out the act which makes the party liable. The largest words possible have been used; “solicit,” that is defined to be to importune, to entreat, to implore, to ask, to attempt, to try to obtain; “encourage,” which is to intimate, to incite to any thing, to give courage to, to inspire, to embolden, to raise confidence, to make confident; “persuade,” which is to bring to any particular opinion, to influence by argument or exhortation, to inculcate by argument; “endeavor,” and then, as if there might be some class of cases that would not come within those words, the remarkable words are used “or shall propose to,” that is to say, make merely a bare proposition, an offer for consideration, shall be guilty of a misdemeanor. It is to be a misdemeanor of a highly criminal character to solicit, to encourage, to persuade, or even to propose to any person to murder any other person, whether one of her majesty's subjects or not. Now Mr. Sullivan raised the argument which was passing through the lord chief justice's mind, that you must have an immediate connection between the “proposer,” or between the “solicitor” or the “encourager” and the person who is solicited, encouraged, persuaded, or proposed to; that it is not

sufficient to solicit generally anybody, that you must solicit some person in particular. What was the intention of this act? The intention was to declare the law and to protect people abroad from the attempts of regicides of this description, and therefore the largest possible words are used. It shall be criminal—not to persuade an individual, but to persuade “any person,” that is to say, the “public”—crowds who may hear it if it is an oration, or who may read it if an article in a newspaper. I have been furnished from the bar with a case which is certainly not inapplicable to the present one, which is to be found in Peere Williams's Reports in the time of Lord Chancellor Parker. *Poole v. Sacheverell*, 1 P. Wms. 675. The question arose in this way. There was a question of a disputed marriage, and the father, who was interested in the marriage, put an advertisement in the newspapers offering a reward of a hundred pounds if any person would come and could give evidence of that marriage. It was suggested that the object of that being circulated was to render impure the sources of justice, to bribe some people to give improper evidence, and the party was brought up for contempt before Lord Chancellor Parker, but it was urged on his behalf that nothing had been done in consequence of the advertisement. No witnesses had come: but the lord chancellor said: “It does not appear that some person would not come in if this were not discouraged; however, the person moved against has done his part, and if not successful, is still not the less criminal.” The counsel objects that it is not addressed to any particular person. “It is equally criminal when the offer is to any, for to any is to every particular person. The advertisement will come to all persons, to rogues as well as honest men; and it is a strange way of arguing to say that offering a reward to one witness is criminal, but that offering it to more than one is not so. Surely it is more criminal, as it may corrupt more. If you hold an offer out to the public—an invitation to come in and give perjured evidence—that is as much a criminal act as to request an individual to do so.” Just so it is here criminal to publish to the whole world, or declare to the whole world, that the individual rejoices in regicide, and recommends others to follow his example, and trusts that the time is not long distant when once a month kings may fall. This article was an encouragement to the public—a solicitation and encouragement to any person who chooses to adopt it—and comes within the meaning of the act. I am perfectly satisfied with the conviction, and think it was right.

WILLIAMS, J. I am of the same opinion. The jury have found the defendant guilty, and upon the narrow question of law which has been reserved for the consideration of this court, it seems to me the conviction ought not to be interfered with.

Conviction affirmed.

The Legal News.

VOL. IV. OCTOBER 1, 1881. No. 40.

THE FUNCTION OF THE LEGAL PROFESSION.

In an address delivered by the Hon. Stanley Matthews, Sept. 20, before the N. Y. State Bar Association, the function of the legal profession in the progress of civilization was considered. The essayist is evidently at one with Mr. Gladstone (see 3 L. N., p. 73) in believing that the age of law and lawyers is not likely soon to pass away. "It may be thought," says Mr. Matthews, "that the advancement of society, in cultivation, intelligence, virtue, and all that enters into civilization, would necessarily diminish the area of enforceable obligations, and lessen the number of occasions for the intervention of the law. The result might be supposed to follow from the increased knowledge on the part of the community of what duty required in particular circumstances; increased efficiency on the part of the extra-judicial forces of the community, in their influence over individuals, resulting in a more ready and voluntary compliance with obligations generally recognized by the public conscience. But new questions of law arise with new facts and new relations among men; and as society progresses in its development, its organization becomes more intricate, men are brought nearer and into novel situations, and with unprecedented relations, which will constantly furnish new studies for the jurist and the legislator, and the area of enforceable obligations will enlarge and not diminish. Indeed, it is quite likely that many cases now occur, in which no remedy exists, which a more highly organized state of society, and a more perfect justice, may not be willing to leave to the mere good will of private conscience." And in support of this conjecture, Mr. Matthews cites the opinion expressed by Mr. Charles O'Connor, in his argument in the case of the "General Armstrong," that jurisprudence, as administered by human tribunals, "deals only with the means of enforcing rights which are recognized as perfect; but like all moral sciences, it is capable of improvement. As the general mind of a nation advances in that

freedom which is the result of increased knowledge, the legislative authority will constantly enlarge the sphere assigned to jurisprudence, and increase its power of establishing justice." So, too, Sir Henry Maine, in his "Early History of Institutions," (p. 49), says, "The truth is that the facts of human nature, with which courts of justice have chiefly to deal, are far obscurer and more intricately involved than the facts of physical nature; and the difficulty of ascertaining them with precision constantly increases in our age through the progress of invention and enterprise, through the ever growing *miscellaneousness* of all modern communities, and through the ever-quickenning play of modern social movements. Possibly we may see English law take the form which Bentham hoped for and labored for: every successive year brings us in some slight degree nearer to this achievement: and consequently little as we may agree in his opinion that all questions of law are the effect of some judicial delusion or legal abuse, we may reasonably expect them to become less frequent and easier of solution. But neither facts, nor the modes of ascertaining them tend in the least to simplify themselves, and in no conceivable state of society will courts of justice enjoy perpetual vacation."

AMERICAN REPORTS.

The thirty-fifth volume of American Reports, edited by the conductor of our contemporary the *Albany Law Journal*, contains a number of cases of general interest. A peculiar form of burglary is disclosed in *Walker v. State*, in which it was held that one who, intending to steal shelled corn, bores a hole through the floor of a corn crib from the outside, and thus draws the corn into a sack below, is guilty of the above mentioned crime.

Continued strictness of Sabbath observance in New England is indicated by the Massachusetts case of *Davis v. Somerville*, in which the Court held that one who is injured by a defect in a highway, on his return from a funeral, on Sunday, having diverged from his ordinary route to make a social call, is without remedy. Under the head of common carrier may be noticed the decision in *Nashville and Chattanooga Railroad Co. v. Sprayberry*, that a passenger by railway, purchasing a ticket over the line of the seller and connecting lines, and

injured by the negligence of one of such connecting lines, cannot maintain an action therefor against the seller. In *State v. Littlefield* it was held that a former conviction of assault and battery is no bar to an indictment for manslaughter, where the injuries resulted in death after the former conviction.

Under the subject of evidence may be mentioned the case of *Reese v. Reese*, in which it was decided that an expert, who has no knowledge of a handwriting in dispute, except from having seen the alleged penman write several times, and that only for the purpose of testifying, is incompetent to give an opinion thereof; and *Alleman v. Stepp*, in which the Court decided that evidence is competent to show that the mind and memory of a witness have become impaired by disease and are in a feeble condition. In another case, *Estate of Toomes*, it was decided that a Roman Catholic priest, regularly educated and officiating as such, and required by the duties of his office to pass his judgment upon the mental condition of invalids and dying persons, to the end that he may administer the sacraments only to those whose minds are in a proper state to reason or act of their own volition, is an expert as to the sanity of a person whom he so attends.

Under the head of contract, it was held in *McMillan v. Malloy*, that on a contract to thresh an entire crop of wheat at a given price per acre, the employee, failing fully to perform, may recover at the contract price for what he has done, less the damages sustained by the employer by the breach of contract. And in *Hanks v. Naglee* it was adjudged that a promise of marriage in consideration that the promisee should before marriage have sexual connection with the promisor, in void. A striking case of fraud is to be found in *Hall v. Carmichael*, in which the Court was asked to pronounce upon a secret conveyance by a woman of her property to an insolvent for an inadequate consideration, pending negotiations for her marriage and three days before marriage, which was held fraudulent as to the husband. We conclude with two insurance cases. In *Williams v. Hartford Insurance Co.*, held, in case of insurance against fire upon a building, if the building loses its identity and specific character by fire, although a large part of the walls and some of the iron attached thereto are left standing, it

is a "total destruction" within the meaning of the policy. In *Knecht v. Mutual Life Ins. Co.*, the Court seems to have interpreted the contract with considerable liberality to the insured. In an application for a life insurance policy the applicant declared "that he does not now nor will he practice any pernicious habit that obviously tends to the shortening of life." The policy contained a condition "that if any of the statements or declarations made in the application shall be found in any respect untrue, the policy shall be void." At the time of the application, applicant's habits were correct and temperate; afterwards he took to excessive drinking, whereof he died. Held, that the policy was not avoided.

OBITUARY.

Within a few days two members of the Quebec judiciary have departed this life. Mr. L. A. Olivier, Judge of the Superior Court for the District of Joliette, died Sept. 19th. On Saturday, Sept. 29th, Judge Bossé, a retired judge of the Superior Court, District of Quebec, also died.

M. Olivier was born about 1817, called to the bar, 1839; created a Q. C. in 1864. He sat for De Lanaudière Division in the Legislative Council of Canada from 1863 to the Union, when he was called to the Senate by Royal proclamation. On the 6th September, 1873, he was appointed to the bench.

M. Bossé was born at Cap St. Ignace, P.Q., 25th December, 1806. He was educated in Quebec; studied with the late A. R. Hamel of Quebec, and was called to the bar in 1833. In 1867 he was made Q. C. He represented the De La Durantaye Division in the Legislative Council of Canada from 1862 until the Union, when he was called to the Senate by Royal proclamation. On the 18th January, 1868, he was appointed a Judge of the Superior Court. He retired towards the close of last year, when he was succeeded by Mr. Angers (3 L. N. 378).

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, Sept. 27, 1881.

Before MACKAY, J.

ROBERTSON v. LA BANQUE D'HOCHELAGA.

Shares—Cancellation—Putting on demeure.

Shares of bank stock cannot be declared confiscated for non-payment of calls, without notice putting the owner en demeure.

MACKAY, J. The plaintiff, who in 1876, and up to October, 1880, owned fifty shares in the capital stock of defendant's bank, sues to have certain calls made by the directors, declared irregular, null and void, and certain resolutions by them under which the plaintiff's stock was confiscated in October, 1880, declared illegal, and to have the defendant ordered to restore the said stock and to register plaintiff as owner of it.

Seven calls on the stock appear to have been made by one resolution in July, 1874. That was irregular, says plaintiff; there ought to have been seven resolutions for seven calls, and at seven different meetings; moreover, says the plaintiff, that resolution was abandoned, and it does appear that no action was had under it up to 1880. This calls for observation, as also does the resolution, as it states no amount of any call, nor appoints any place for payment, but my decision will not turn upon this. In January, 1880, the directors made a new call, and for eight instalments, or calls; plaintiff complains again of this, on the ground that by a single resolution such eight calls could not be legally made; besides (says the plaintiff) the resolution in its language is not a call but a resolution to notify of calls that afterwards would be made, but never were made. The declaration complains of a resolution of the 27th of October, 1880, confiscating plaintiff's stock, upon which two thousand nine hundred dollars had been paid; and claims that the resolution and confiscation were illegal. Then the declaration alleges a tender by plaintiff, in November, of \$2,136.50, being for all that possibly could be lawfully claimed by the Bank or be due to complete full payment with interest for all the 50 shares that plaintiff had owned, which tender was refused.

The defendant's plea is very long because it justifies, at length, each and all of the Bank Directors' resolutions and doings, states particulars of all notices given to the stockholders, the plaintiff among them, insists upon the strict formality of all done, claims that plaintiff was wilfully in default, that so he incurred the penalty of confiscation; that the defendants gave all notices public and by registered letters to the plaintiff; that the plaintiff always ac-

quiesced in the calls as made, and promised to pay their amounts, but always has neglected to pay, this because of the low price at which the stock could be bought in the market; the stock has risen, and now, because of that, the plaintiff wants to get it back; that the Directors, in confiscating the plaintiff's stock, acted as they were bound to do, and no more, &c.

Our Bank Act of 34 Vic. (1871) is far less complete than the English Act—the Companies' Act 25-26 Vic. c. 89, to be found in Smith's Mercantile law. Our Act allows the Directors to make calls, and to sue for them, and to confiscate shares to the profit of the bank, in case of non-payment of calls (Sec. 34). Yet no formalities preliminary to resolution to confiscate are enacted. The 25-26 Vic. orders a notice to pay with a threat of confiscation, after which if the calls due remain unpaid, forfeiture may be made upon a vote of the Directors. Sec. 35 of our Act allows a penalty of 10 per cent. on all shares on which calls are not paid duly, and further the directors may sell by public auction any shares on which calls are unpaid, giving 30 days' public notice of their intention. In the multitude of the remedies that the defendants had towards securing payment of the bank stock they became bewildered apparently, and, so on the 27th October, they confiscated plaintiff's stock without any previous decision to confiscate it if the plaintiff did not pay up. The confiscation is defended by reference to Sec. 34, which says that the directors may confiscate. We have only to read Brais' (the cashier's) deposition, pp. 18, 19, 21, to see that the directors were uncertain as to what rights they possessed, and Brais' notes to the plaintiff are studiously enigmatical. The stock-holders in general meeting had directed the directors to take steps to get in the capital of the bank. Brais writes therefore to plaintiff that if he do not pay, the bank will take legal proceedings to recover the amount. After a while he writes again: "If you do not pay, the account will be sent to our attorneys for collection." Finally he writes: "If you do not pay, the directors will serve themselves as regards you to the privileges that the law gives them."

Confiscation is not favorable. Suppose a banking act to say that the bank might make by-laws to compel payment of the stock, and even confiscate shares on which calls remained

unpaid. Surely a by-law that would enact confiscation, without previous notice to pay up, else to suffer confiscation, would be unreasonable, and therefore of no use. I think that Sec. 34 of our Act of 1871 ought not to be interpreted to justify defendant's conduct in confiscating plaintiff's shares without previous clear putting of him *en demeure*. The directors after his default threatened twice to sue him, not saying one word about confiscation. Their cashier's third letter purposely omitted mention of confiscation. The directors had not, before the 27th of October, passed any kind of resolution to confiscate, but, on that day, confiscated. As it seems to me, their conduct was unreasonable, oppressive and illegal. It could not stand for a moment under the legislation of the mother country; but, as I have said, our law is not so full and clear as is the English. Nevertheless, I feel that I ought to disapprove such a confiscation as has been here. If I had doubt, I would have to lean against confiscation. I therefore give judgment for the plaintiff.

Maclaren & Leet for plaintiff.

Beique & McGoun for defendant.

SUPERIOR COURT.

MONTREAL, Sept. 27, 1881.

Before MACKAY, J.

ROSS V. VANNECK.

Loan—Admission of liability.

Where A applied to B for a loan, and B accepted a draft drawn by C, which A subsequently admitted was for his assistance, and he paid B part of the amount of the draft, and promised to pay him the balance, held, that A was liable to B for such balance.

MACKAY, J. The defendant is sued for \$4,092.34, balance alleged to be due to plaintiff as for moneys lent in 1874. That is the nature and substance of the plaintiff's action, though the words "money lent" do not occur in the declaration, which in its architecture is out of the common. It sets forth, *en toutes lettres*, a parcel of letters, seven from plaintiff to Alexander Torrance, five from plaintiff to defendant, four from Torrance to plaintiff, and three from the defendant to plaintiff. It commences by alleging that defendant applied to plaintiff in 1874 for a loan of \$5,000, which was refused; that the defendant renewed his application, whereupon the

plaintiff agreed to "advance" it if Alexander Torrance became security, as he did. The money was, says the declaration, then advanced to the defendant, at the Bank of Montreal, in August, 1874, upon Torrance's draft on plaintiff at 6 months, delivered to the defendant, cashed by the Bank, and ultimately paid by the plaintiff, and now exhibited. The declaration claims that under the correspondence exhibited, Vanneck made it his personal affair to save plaintiff from liability from his acceptance of Torrance's draft, before referred to; that he, the defendant, made payment on account of it, and promised to pay the rest, but that the sum sued for remains due. Torrance has died.

The defendant pleads that the advance "was to Torrance, without any reference to any undertaking, or responsibility, by the defendant. That the debt is Torrance's, and cannot be converted into a debt of the defendant." "That the defendant refused always to endorse or incur any liability with respect to the said \$5,000 advanced to Torrance," etc.

It would have been satisfactory to have had Vanneck examined. It does not appear who got the cash for the draft from the Bank of Montreal. What is proved, taken with the correspondence, leads the Court to believe true and honest the plaintiff's demand. Ross advanced the money intending to look to both Torrance and Vanneck for return of it. It would have been better for him to have gotten Vanneck's endorsement on Torrance's draft, but the Bank of Montreal cashed the draft before Ross had it presented to him for acceptance, and he (without insisting upon anything specially) accepted; apparently not doubting that good faith would be observed to him, by Vanneck and Torrance. Ross considered both his debtors; he addresses Torrance as his debtor, who does not repudiate yet refers to defendant as having burden to pay. Defendant's letter of 23rd April, 1875, is admission clear in favor of Ross. Says defendant, "I enclose a cheque for \$2,000 "gold which you can put to my credit in the "account, and I will pay the rest as soon as I can." In August 1875, Ross writing to Torrance refers to balance due by him, and Jack (meaning the defendant). Torrance does not repudiate, and the defendant writes to Ross:—"Alick has "handed me your letter. I have not forgotten "the debt, but times are so bad that I have no

"money to spare. The first money I have to spare I shall send to you, and I hope you will let the matter lie over for the present." Four months after that, defendant writes (among other things), "when business was good I allowed uncle Alick to draw out of our office more than sufficient to cover the proceeds of his draft upon you for my assistance; so that as you had his security for that money I feel morally relieved of the responsibility for the debt." How, in the face of such correspondence, the defendant, having gotten plaintiff's money, can expect Court or Judge to find for him is past comprehension. It was argued that Vanneck was a mere agent for Torrance in these matters, but what of that in the face of his making it his own personal affair to pay Ross? Just nothing at all. See Troplong, also Paley, by Dunlap.

Judgment for plaintiff.

Kerr, Carter & McGibbon, for plaintiff.
R. & L. Laflamme, for defendant.

COUR DE CIRCUIT.

MONTREAL, Sept. 27, 1881.

Before CARON, J.

POULIN v. FALARDEAU.

Réclamation d'un tiers contre une faillite—Solidarité de la masse—Sec. 135 de l'acte de faillite, pas applicable—Recours de droit commun.

Le 17 février 1880, A. B. Stewart, syndic à la faillite C. E. Pariseau, prit une action contre H. E. Poulin, en nullité d'une vente faite par lui, dit syndic, à Poulin, sous prétexte de fraude et de fausses représentations. Cette action fut renvoyée le 30 Dec. 1880, par son Hon. le juge Chagnon. Une exécution fut émanée contre le syndic, pour les dépens taxés à \$103 en faveur de MM. Lareau et Lebouf, avocats de Poulin. Le syndic n'avait rien appartenant à la faillite Pariseau. L'huissier fit un retour de *Nulla Bona*. Pour se faire payer, Poulin divisa le montant de sa dette entre les créanciers de la faillite Pariseau, chacun d'eux pour sa part et portion, au *pro rata* du montant de leurs créances respectives. Falardeau, un des créanciers, ayant refusé de payer sa part, fut poursuivi.

M. DeLorimier pour le défendeur, dit :—1o Que le syndic n'a pas été autorisé par les inspecteurs à procéder contre Poulin (le contraire fut prouvé); 2o Le demandeur n'a pas régulièrement établi l'insolvabilité de la faillite; cela ne pou-

vait être fait par un retour de *Nulla Bona*. Le seul moyen régulier était la procédure indiquée dans la section 135 de la loi de faillite, à savoir une requête au juge pour enjoindre le syndic à préparer une feuille de dividende en faveur de Poulin.

M. Lareau, pour le défendeur, dit : Que la section 135 ne s'applique pas à la cause, puis que le demandeur ne s'adresse pas directement au syndic; que son recours est de droit commun; que la sec. 135 n'a en vue que les créanciers à la faillite, cherchant à procéder contre le syndic au cours d'une liquidation; que pratiquement la procédure proposée deviendrait illusoire, puisqu'il dépendait du bon plaisir des créanciers de se taxer en faveur d'un tiers dont la créance serait toujours sujette à objection.

La Cour, après délibéré, a donné jugement au demandeur, avec dépens.

Lareau & Lebouf, pour le Demandeur.

T. & C. De Lorimier, pour le Défendeur.

*. Autorités du demandeur : Acte de faillite de 1875, §§ 35, 39, 96. Renouard, faillite, vol. II, pp. 202, 203, et suiv., 307.

ALMANACS AS EVIDENCE.

In *State v. Morris*, 47 Conn. 179, a trial for burglary, for the purpose of showing that the offence was in the night the State was permitted to introduce in evidence a copy of an almanac. The court said: "There is no error in this. The time of the rising or setting of the sun on any given day belongs to a class of facts, like the succession of the seasons, changes of the moon, days of the month and week, etc., of which courts will take judicial notice. The almanac in such cases is used, like the statute, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury." In *Munshower v. State*, Maryland Court of Appeals, October, 1880, 2 Cr. L. Mag. 320, an almanac was admitted to show the time of the rising of the moon on a given night. The court said: "The precise periods at which the sun and moon will rise or set in any particular 24 hours in the future, are as certain and as capable of exact mathematical ascertainment as is the occurrence of the day in which such rising or setting shall take place. Courts have received as evidence weather reports, reports of the state of the markets, prices current, and insurance

tables, tending to show the probable duration of human life, though these are records which are not capable of mathematical demonstration, which cannot be tested by any certain law, and which may or may not omit the record of changes which have actually taken place. But an almanac forecasts with exact certainty planetary movements. We govern our daily life with reference to the computations which they contain. No oral evidence or proof which we could gather as to the hours of the rising or setting of the sun or moon could be as certain or accurate as that which we may gather from such a source." In *Sutton v. Darke*, 5 H. & W. 647, Pollock, C. B., said, *obiter*: "The almanac is part of the law of England. In *Regina v. Dyer*, 6 Mod. 41, it is stated that all the courts agreed it was: but it does not follow that all that is printed in every printed almanac is part of it, as for instance, the proper time of planting and sowing. Also in *Brough v. Perkins*, 6 id. 81, it is said that the almanac is part of the law of England; but the almanac is to go by that which is annexed to the common prayer book. Looking at that, I find it says nothing about the rising or setting of the sun, and I rather think that any information on that subject is quite recent." So Taylor (Ev., 1230) says: "The hour at which the moon rose is a fact, and it can fairly be argued upon the general principles of the law of evidence, that the best evidence of that fact is the testimony of some one who observed its occurrence. Books of science are generally not evidence of the facts stated in them, although an expert may refresh his memory by their use." In *Collier v. Nokes*, 2 C. & K. 1012, the court held that although they would take judicial notice of days, they would not of hours, as of the hour of sunrise or sunset. In *Allman v. Owen*, 31 Ala. 167, it was held that courts will judicially take cognizance of the coincidence of days of the month with days of the week, as disclosed by the almanac.

Wharton says (Ev., § 282) that a judge "may refer to almanacs." So says Best. Now if the judge may turn to an almanac to satisfy himself when the sun set on a particular day, why may not the almanac be put in evidence to satisfy the jury of the same fact?

In *Sisson v. Cleveland, etc., R. Co.*, 14 Mich. 497, it was held, Cooley, J., giving the opinion,

that newspaper reports of the state of the markets are receivable in evidence. The learned judge remarked: "Courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character." The reason in favor of the mathematical demonstrations recorded in the almanacs is much stronger than that in favor of the comparatively inexact and discordant reports of newspapers, dependent solely on hearsay.

In speaking of books of exact science, Wharton says (Ev., § 667): "The books containing such processes, if duly sworn to by the persons by whom they are made, are the best evidence that can be produced in that particular line. When the authors of such books cannot be reached, the next best authentication of the books is to show that they have been accepted as authoritative by those dealing in business with the particular subject."

In *Morris v. Hanner's Heirs*, 7 Pet. 559, it was held that although historical works are evidence of ancient occurrences, which do not presuppose the existence of better evidence, yet if the facts related by a historian are of recent date, and may fairly be presumed to be within the knowledge of many living persons, then the book is not the best evidence within the reach of the parties. But there is great difference between matters of historical difference and mathematical certainty; between the accounts of the late civil war by Jefferson Davis, or Mr. Pollard, on the one hand, and Gen. Badeau or Gen. Sherman on the other, and the tables of the tides, an almanac, or the multiplication tables. We agree with the annotator of the Maryland case in the *Criminal Law Magazine*, that "we govern our daily life by reference to the computations of the almanac, and these computations are more satisfactory to us than the computations of persons who have actually observed the events, predicted by such computations. The world at large regards the statement of an almanac in regard to the hour of sunrise as more certain and satisfactory than the recollection of individuals. A rule which would exclude the evidence of an almanac is too narrow and technical to find favor in modern jurisprudence." It would be almost impossible, in a great majority of cases, to prove, by human testimony, the precise hour

of the rising or setting of the sun or moon on any particular day a number of years, or perhaps a few months, ago. To ascertain an individual who happened to observe and note it, would be like hunting for a needle in a haystack. If the English judges are determined to wait until the church shall recognize the fact that science has predicted these occurrences for many years in the past, and shall conform her prayer book accordingly, they are welcome to do so, but for us a Poor Richard's Almanac is much better practical evidence on such subjects than the prayer book. The church has always been slow to accept the demonstrations of science; witness the cases of Galileo and Columbus. Perhaps the English judges may regard a scientific discovery several centuries old as "recent," but it seems old enough for acceptance by courts of justice without waiting for the bishops. A knowledge of the times of the rising and setting of the sun and moon may be of no consequence to the church, but it frequently is important in worldly affairs, and laymen will take the most convenient and certain means of acquiring it.—*Albany Law Journal*.

RECENT ENGLISH DECISIONS.

Maritime law—Conflict of law—Collision on high seas between vessels of different nationalities.—Collisions between ships when one or both are foreign, on the high seas, are questions *communis juris*, and liabilities created by them are to be decided by the general maritime law of liability as administered in the court where the cause is tried. By general maritime law the liabilities of the ship and of the owners are identical for damages arising from collision. A collision took place on the high seas between a British and a Spanish ship; both vessels sank. The English owners commenced a suit against the Spanish shipowners, who had an office in England. The Spanish shipowners appeared, and pleaded that by Spanish law there was no personal liability. *Held*, a bad defence, as the liability was governed by general maritime law, and not by Spanish law. The *Druid*, 1 W. Rob., at p. 399; The *Volant*, id. 387; The *Johann Friederich*, id. 35, at p. 40; The *Wild Ranger*, 7 L. T. Rep. (N. S.) 725 S. C., Lush, 553; The *Zollverein*, Swabey, 99. Prob. D. & Ad. Div., May 11, 1881. The *Leon*.

Opinion by Sir R. Phillimore, 44 L. T. Rep. (N. S.) 613.

Patent—Infringement of—Transfer of patented article made abroad through Custom House for exportation not vending, making or using—Agency.—The plaintiffs were holders of a patent for rendering capable of safe transportation a powerful explosive, which had previously been practically useless, and its transportation prohibited by statute, by reason of its extreme sensitiveness to shocks. The defendants, who were export merchants, had transhipped in the Thames, for exportation to Australia, large quantities of the explosive, which had been consigned to them from abroad for that purpose, and had been rendered safe in the mode prescribed by the plaintiff's invention. *Held* (reversing the decision of Bacon, V. C.), that there had been no interference by the defendants with the plaintiff's invention. The defendants never had any interest in, or any control over, the goods; and it could not be said that writing to the Custom House, in order to get power to transfer them from one ship to another, was making, or using, or vending the patented article. The court always hold a hand over agents, but they must be actual agents directly employed in the transaction in question, and it would not extend its doctrine, and say that any person who had anything to do with the removal of goods from a manufactory to a storehouse would be liable to damages or an injunction, if it turned out that the goods were an infringement of a patent or trademark. Ct. of Appeal, April 29, 1881. *Nobels' Explosive Co. v. Jones, Scott & Co.* Opinions by James, Baggallay and Lush, L. JJ., 44 L. T. Rep. (N. S.) 593.

GENERAL NOTES.

We have received Nos. 2 and 3 of "The Kentucky Law Journal" (for August and September, 1881), conducted by Mr. George Baber, and published at Louisville. In an article on "Legal Humbugs," we find the following:—"A day rarely passes which does not mark the receipt of a circular informing the person addressed, that he, of all living men, has been selected as a member of the most popular and thorough legal association in the world—one whose members are seen amid the burning sands of Sahara, the delightful isle of Terra Del Fuego, or the classic fields of Patagonia. So it is; only one dollar is asked for the privilege of allowing a member of the noblest profession on earth to "nose" among the affairs of his neighbor and report his finan-

cial standing. * * * Why should this species of buckstering among the profession be longer tolerated? Why should not the attorneys meet in every town in Kentucky, and, by unanimous consent, resign their membership in such bodies? The present system is the outgrowth of a morbid desire to advertise—a modern sentiment that found no place in the honest and primitive, though solid and learned, days of the profession."

A judge in the West, it appears, has created amusement for some wise people, by pronouncing *route* like "root," instead of "rowt."

The will of the Hon. Arthur Annesley, formerly a captain of the Grenadier Guards, which was proved July 28, was in these words: "All that I possess in the world I leave to my wife."

A lawyer of Portland, Maine, has sued a man for 27 cents which he had lent to him. This Portland *Cresus* has probably learned ere this that financial loans had better be left to the Barings and Rothschilds of the world.

At a meeting of the members of the Bar, the Hon. R. Lafamme, Q.C., and the Batonnier, Mr. W. W. Robertson, were named delegates to the General Council, and the following gentlemen appointed examiners: S. Bethune, Q.C.; S. Pagnuelo, Q.C.; N. W. Trenholme and C. C. De Lorimier.

The new court house has so far advanced towards completion that the courts will now be held there. On Monday next the judges of the Superior and Circuit Courts will resume business upon the calendars. Much, however, remains to be done to fully fit the different rooms for court purposes.—*Chicago Legal News*.

Judge Black has long worn a black wig. Having lately donned a new one, which looks still darker, and meeting Senator Bayard, of Delaware, the latter accosted him with, "Why, Black, how young you look; you are not as gray as I am, and you must be twenty years older." "Humph," said the judge, "good reason: your hair comes by descent, and I got mine by purchase."

The *Southern Law Review* for August-September contains the following leading articles:—Rights of parties who acquire an interest in lands subject to a lien, by Orlando F. Bump; Power of the State and National Governments to regulate and control railroads, by David Wagner; American Law Schools, past and future, by W. G. Hammond; Stock, its nature and transfer, by Henry Budd, Jr.

The Supreme Court of California, in a recent case, *Fratt v. Whittier*, rendered a decision upon the much-mooted question of fixtures, holding that chandeliers were permanent parts of a building. The decision seems to have been based upon the intention of the parties, as gathered from the written and oral testimony. The decision of the court in this case seems to be at variance with that of the New York Court of Appeals, in *McKee v. Hanover Fire Ins. Co.*, where chandeliers attached to gas pipes running through the house were held not to be fixtures so as to pass with the realty.

Speaking of the justices of the peace whose names were stricken from the rolls for corrupt practices, the London *Law Times* says:—"The Government have resolved not to publish the names of the justices of the peace who have been struck off the roll of magistrates by the Lord Chancellor for corrupt practices. The reason assigned for the non publication is that there would be considerable difficulty in distinguishing the merits of cases to which the same measure of punishment has been meted. The total number of magistrates struck off the roll is twenty-five, and two cases are still under consideration."

A. was prosecuted for bigamy. He pleaded, first, that his first marriage had no legal existence, because his intended wife had deceived him, being *coëncie* by another man, and because he was a minor, and did not obtain his father's consent to the marriage. The court held these things might have made the first marriage voidable, but not void. A. further pleaded the statute of limitations. The Court of Cassation decided that in bigamy the statute did not begin to run till one of the marriages was dissolved: "for while the double bond of matrimony exists, the illegality continues, which makes the essence of said crime."—*Vienna Juristische Blätter*.

Samedi dernier (Sept. 24) il y a eu réunion du conseil général du barreau de la province de Québec, sous la présidence de W. W. Robertson, batonnier général. Étaient présents l'hon. W. G. Malhiot et William White, batonniers; l'hon. George Irvine, l'hon. R. Lafamme, E. T. Brooks et C. J. B. L. Hould, délégués; et C. T. Suzor, sec.-trésorier. Le conseil était au complet à l'exception de M. Joseph G. Bossé, batonnier du district de Québec, dont le père, M. le juge Bossé, vient de mourir à Québec. Un comité spécial composé de MM. Lafamme, White, Hould, Suzor et Payment a été nommé pour élaborer des règlements. La question de nommer des sous-examineurs d'après la section 34 de la charte a été prise en considération et approuvée. Mais avant de faire ces nominations on a cru préférable de consulter les quatre examinateurs de chaque district et de leur demander de suggérer les règlements qu'ils jugeront convenables pour définir les devoirs de ces sous-examineurs. Il y aura une nouvelle réunion du conseil général dans le mois de Novembre. Le comité des règlements fera alors son rapport.

At the assizes, on Friday, the 5th August, at Norwich, before Mr. Justice Denman, a well-known inhabitant of that city, being called as a juror, and directed to take the New Testament to be sworn, said he thought he had better affirm; on which the learned judge, referring to the statute, asked him if he objected to be sworn; to which he answered, "Certainly not." The learned judge then said, "Then you can be sworn." The juror said, "My position is this, that I have no religious belief, and that the oath would have no effect on my verdict." The learned judge then read the terms of the statute, 21 & 25 Vict. c. 16, in which the form provided is: "I do solemnly, sincerely and truly affirm and declare that the taking of an oath is, according to my religious belief, unlawful," and then inquired of the juror if that would be true of him. To which he again answered that he had no religious belief. The learned judge then said that in his opinion the juror could neither be sworn nor affirm, and directed him to stand aside, which he accordingly did, and another juror was sworn and served in his place.—*Law Journal (London)*.

The Legal News.

VOL. IV. OCTOBER 8, 1881. No. 41.

THE SUICIDAL IMPULSE.

The lamentable death of Mr. Justice Colt, of the Supreme Judicial Court of Massachusetts, by his own hand, in a fit of melancholy, has already been noticed. Concerning this gentleman the bar of Massachusetts have adopted the following kindly resolution:—

"Resolved, that in his death the Commonwealth has suffered a severe public loss. His ample learning; his conscientious application of his best powers to the execution of the duties of his high office; his broad, sagacious, and practical apprehension and understanding of affairs; his patience in investigation; his fraternal courtesy and spirit of professional fellowship; his kindly and sympathetic interest in the rights of suitors, and his unsullied integrity of personal character, combined to make him worthy of our utmost confidence and our highest respect and esteem." Judge Hoar once said of him, that "he had that quality of respecting everything that is respectable, which is one of the best traits of the best men of this Commonwealth." It is much to be lamented that the career of such a man should have so melancholy a termination. The parallel cases of Sir Samuel Romilly and Mr. Justice Willes in England, at once suggest themselves, (not to mention that of Hugh Miller in a different calling.) The *American Law Review*, for October, mentions that Abraham Lincoln, according to his biographer Lamon, had to struggle against the same suicidal impulse, which occasionally exercises so powerful a sway over highly gifted and cultivated minds.

FRAUDULENT PREFERENCE A "SECRETING."

A case which has long stood in the reports received an emphatic overturning during the last term of the Court of Queen's Bench. In *Gault v. Donnelly*, 1 Lower Canada Law Journal, p. 119, (A.D. 1866) it was held that a fraudulent preference is not a secreting. Mr. Justice Badgley, who rendered the decision in the

Superior Court, remarked: "This sale bears all the appearance of a fraudulent preference, but it has been already decided that a fraudulent preference is not a secreting. The word secreting conveys the meaning of concealing, hiding, putting aside in unfrequented places. Fraudulent preference, therefore, does not in any way come within the meaning of the legal term secreting. The act of secreting his effects would be a selfish act for his own advantage; whilst a preference given to a particular creditor is not for the debtor's own advantage but for that of the creditor."

The case was taken to appeal, and was there affirmed by Justices Drummond, Mondelet and Johnson, but the then Chief Justice (Duval) strongly dissented. "The whole case" his honor remarked, (3 L.C. Law Journal, p. 57) "turns upon the interpretation to be put upon the word 'secreting.' The facts of the case are that the defendant, being the plaintiffs' debtor and being insolvent, made over a portion of his property to Mr. Walsh, another of his creditors. It is contended that this was only an undue preference, and does not amount to a fraudulent secretion. But what meaning can be given to the term 'secreting,' if it be not a secreting to put property beyond the reach of the creditors, as was done in this case?" The view of the late Chief Justice has been adopted by the majority of the same Court in the case of *Gault & Dussault*, reported in our present issue. The same principle is to be found in *Molson & Carter*, 3 L.N. 258.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, Sept. 20, 1881.

DORION, C. J., MONK, RAMSAY, CROSS, and BABY, JJ.
GAULT et al. (plffs. below), Appellants, and
DUSSAULT (deft. below), Respondent.

Capias—*Secreting*—C.C.P. 798.

Fraudulent preference, by which assets which should be available to the creditors generally, are given to one or more, is equivalent to secreting.

The appeal was from a judgment of the Superior Court, Montreal, Rainville, J., granting the petition of respondent, a trader in Sherbrooke, for liberation from arrest under writ of

capias. The writ of *capias* was issued upon affidavit alleging that a writ of attachment under the provisions of the Insolvent Act of 1875 had been issued against defendant's estate; that he had been guilty of fraud within the meaning of the Act; that prior to the attachment, and within the three months preceding it, defendant had disposed of a portion of his stock-in-trade to one Deseve, the purchase price of which stock remained unpaid. The Judge in the Court below considered that the facts did not amount to secreting, and granted the defendant's petition for liberation.

DORION, C. J., said, it had been decided over and over again by the Court as now constituted, that the remedy by *capias* subsisted concurrently with the Insolvent Act. He was not, therefore, prepared to hear the question raised in this case. The Chief Justice commented on the facts as established by the evidence, (which appear in the judgment below) and held that it was a clear case of fraudulent preference, amounting to secreting. His Honor could not understand the attempt to make a distinction between secreting and fraudulent preference. The French version used the words *cacher ou soustraire*. This was the same as *receler*, which was *détourner, distraire, divertir*, the effects which should be available to the creditors generally, and there could be no doubt that the acts of the respondent were equivalent to a *recel*.

RAMSAY, J. I concur so fully in what has fallen from the learned Chief Justice, in delivering the judgment of the Court, that I should have thought it unnecessary to add any remark of my own were it not that I consider it important that there should be no doubt as to the individual opinions of the Judges in this important matter. The question is simply as to the meaning of article 798 of the Code of Procedure. No question was raised at the Bar as to any conflict between the Insolvent Act and the article, and if it had been, the decision could not have given rise to any difficulty. As the Chief Justice has said, over and over again we have decided that proceedings in insolvency did not deprive the creditor of the right to take out a *capias*. Again, there is no question as to the proceedings being fraudulent. We are all agreed there was fraud. The effect of the transactions complained of appears to have been

to reduce the available assets of the estate from 75 cents in the dollar to about 12 cents. The argument, which has been pointedly stated by one of the learned Judges who dissents, is that there may be a fraudulent disposal, which does not amount to secreting, and that an instance of this is a fraudulent preference. I believe there is some authority for this view, but I confess I am unable to understand it. I can conceive a payment being so trifling that it could not be considered fraudulent, but if a preference or any other disposal amounts to a fraud, it appears to me to be secreting within the meaning of the Act. Secreting does not mean hiding alone, but, as the article says, any "making away" with property which shall put it unlawfully out of the creditor's reach. Thus one may secrete or make away with property by putting legal impediments in the way of the creditor, by which he is prevented from getting possession of it in order to be paid. I expressed this opinion in the case of *Molson & Carter*, and I understand the Privy Council concurred in it. Indeed, it is difficult to understand that the legislature could have intended it should be otherwise. I am at a loss to conceive why courts should use so much ingenuity to put a strained interpretation on the law to defeat its manifest object. If it be said that it is figurative to call it *secreting*, to pass a fraudulent deed to shield property from seizure, I admit it, but I am not aware that in the interpretation of statutes it is necessary always to adopt the first meaning of the term used.

The judgment is as follows :

" La Cour, etc. . . .

" Considérant que le premier mai, 1877, l'intimé, qui était alors insolvable, et incapable de payer ses dettes, a vendu à A. L. Desève, son confrère et son commis, le fonds de commerce qu'il avait dans un magasin que le dit Desève tenait pour lui à Sherbrooke ;

" Et considérant que cette vente, qui comprenait toutes les créances dues à ce magasin, a été faite d'un seul lot, hors du cours ordinaire des affaires de l'intimé, à l'insu de ses créanciers à raison de vingt pour cent de déduction sur l'estimation des dites marchandises et créances évaluées à \$1,560 ;

" Et considérant que l'intimé a reconnu par sa déposition que le dit A. L. Desève ne possédait

daît rien, et qu'il lui avait payé le prix de vente des dites marchandises par des billets payables à trois, quatre et six mois de leur date ;

" Et considérant que peu de temps après cette vente, savoir, le ou vers le 11 juin 1877, l'intimé, se déclarant incapable de payer ses créanciers, leur a demandé une réduction de 25 pour cent. sur le montant de leurs créances, sans les informer de la vente qu'il avait faite à Desève de l'un de ses magasins, ni qu'il en avait reçu le prix au moyen de billets promissoires ;

" Et considérant que de l'aveu de l'intimé, immédiatement après le refus de ses créanciers d'accepter ses offres, il aurait transporté les billets qu'il avait reçus du dit Desève à ses parents et amis, comme suit, savoir un billet de \$750 à Millier & Cormier, Cormier, l'un d'eux, étant son beau frère ; un autre billet de \$150 à Dupuis & Dupuis, Louis Dupuis, l'un d'eux, étant aussi son beau frère ; un autre billet de \$200 à John Harkness, et un quatrième à Auguste Noël ;

" Et considérant que les dits Millier & Cormier, Dupuis & Dupuis, Harkness et Noël n'étaient pas les créanciers de l'intimé lorsque ces billets ont été transportés, et que ces transports leur ont été faits pour les garantir de la responsabilité qu'ils avaient encourus en endossant pour l'intimé des billets qui n'étaient pas encore échus ;

" Et considérant qu'il appert par la preuve et les circonstances sous lesquels l'intimé a vendu son fonds de commerce, et transporté les billets qu'il avait reçus du dit A. L. Desève lorsqu'il était complètement insolvable, qu'il a fait ces transactions pour cacher et soustraire ses biens et effets dans l'intention de frauder ses créanciers et les appelants en particulier, et que la vente qu'il a ainsi faite, ainsi que le transport des dits billets sont des actes de recel et de soustraction d'une partie de ses biens en fraude de ses créanciers, qui autorisaient les appelants à prendre contre l'intimé les procédés sanctionnés par l'article 798 du Code de Procédure Civile ;

" Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure siégeant à Montréal le 19ème jour de janvier, 1880, qui a déclaré que les paiements faits par l'intimé en fraude de ses créanciers, n'autorisaient pas l'émission d'un *capias ad respondendum* en cette cause ;

" Cette Cour casse et annule le dit jugement du 19 janvier, 1880, et procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, renvoie la requête de l'intimé, et le condamne à payer aux appelants les frais encourus tant en Cour Supérieure que sur le présent appel.

(Dissentientibus les Hon. Juges Monk et Cross.)"

Judgment reversed.

Davidson & Cushing, for Appellants.

Archambault & David, for Respondent.

SUPERIOR COURT.

MONTREAL, Oct. 1, 1881.

Before TORRANCE, J.

MCDUGALL v. SCOTT.

Séparation de corps et de biens—Costs of action.

The wife suing for separation from bed and board, is not entitled to ask that the defendant be foreclosed from making proof unless he pay the fees due to her attorney.

This was a demand by a wife suing her husband for a separation from bed and board. She made a motion that he be foreclosed from making any proof in this cause unless he paid to plaintiff's attorney the amount due for his services.

PER CURIAM. The demand as it is made is irregular. It is true that the form given by Pigeau, Tom. 2 : 216, contains an allowance to the wife as well for aliment and maintenance as for the costs of the action. In the present case, the plaintiff is allowed to sue *in forma pauperis*, and the order has already been given this day for \$20 per month for aliment.

The demand now made, that defendant be foreclosed from making proof unless he pays a sum for costs of plaintiff, should not be granted. Defendant has rights as well as plaintiff, and one is to disprove the plaintiff's case if he can, and prove his own case.

Motion rejected.

B. C. Maclean for plaintiff.

W. Scallan for defendant.

SUPERIOR COURT.

MONTREAL, Oct. 1, 1881.

Before TORRANCE, J.

DUROCHER v. JODOIN.

Exception à la forme—Costs.

This case came up on the merits of two exceptions *à la forme*, filed by two defendants. The return of the bailiff mentioned the service of the writ of summons without the declaration, and said that service was made by leaving a copy of the declaration upon the defendants. The omission was attacked by an exception by each defendant. At the hearing on the merits of the exceptions, the Court was against plaintiff, but gave him leave to amend on payment of costs. These costs were taxed at \$16 for each defendant, and the plaintiff failed to pay them. The case was again heard in its original state, and the exceptions were maintained with costs, which the Court, in its discretion, taxed at \$1 to each defendant, in addition to his necessary disbursements.

A. B. Longpré for plaintiff.

R. Prefontaine for defendant.

SUPERIOR COURT.

MONTREAL, Oct. 1, 1881.

Before TORRANCE, J.

CONTENT V. POIRIER.

Pleading—Demurrer should precede défense en fait.

This case was before the Court on a demurrer to the declaration. The demurrer was preceded by a *défense en fait* or general issue. The Court discharged the *délibéré* on the ground that the demurrer should have been placed first in the order of pleading before the general issue. Vide *Wotherspoon's Manual*, pp. xxi, xxii. Stephens on Pleading, p. 50.

Bourgouin for plaintiff.

R. Prefontaine for defendant.

SUPERIOR COURT.

MONTREAL, Oct. 1, 1881.

Before TORRANCE, J.

LA BANQUE D'HOCHELAGA V. GOLDRING.

Bail under C. C. P. 825—Statement.

A defendant who has given bail under C.C.P. 825, is bound to file a statement within thirty days after judgment maintaining the capias, or, in default, to be imprisoned.

This case came up on a demand by the plaintiff for the imprisonment of defendant, under C. S. L. C., cap. 87, s. 12. The defendant had been arrested for civil debt, and had given bail under

C. C. P. 825. The *capias* had been maintained by the final judgment for \$36,800, rendered on the 31st January, 1881. The defendant was absent from the Dominion, and had neglected to renew one of his securities to the amount of \$10,000 in obedience to the order of the Court. He had not been served personally to answer the present petition, being without the jurisdiction of this Court, and the Court under the circumstances could not require personal service, C. C. P. 781; but the defendant had appeared by counsel who had been served, and he had also been served at the Prothonotary's office, under C. C. P. 84.

S. Cross, for defendant, cited *Poulet v. Launière*, 6 Q. L. R. 314, likening the case to one of special bail.

Béique, for plaintiff, said the bail had been given under C. C. P. 825.

PER CURIAM. This is not the case decided in *Poulet v. Launière*. The bail was given under C. C. P. 825, and it was the duty of the defendant to file a statement under C. S. L. C. cap. 87, s. 12, within thirty days after judgment, or submit to the consequences mentioned in s. 12, s. s. 2. The defendant here is in default, and the imprisonment for a year is ordered.

Petition granted.

Beique & Co. for plaintiff.

Davidson & Cross for defendant.

SUPERIOR COURT.

MONTREAL, Oct. 1, 1881.

Before TORRANCE, J.

MCCRAE V. MILLER.

Capias—Departure with intent to defraud.

A tenant had fraudulently removed his furniture from Montreal, without settling for his rent, and had intimated an intention of going to the United States. Held, that the capias was well founded.

PER CURIAM. This was a petition for the liberation of a debtor arrested under a *capias* for non-payment of his landlord, on the ground that plaintiff believed that he was immediately about to leave the Province of Quebec and Dominion of Canada with intent to defraud, &c. The evidence showed that the defendant, a sewing machine agent, took a lease from McCrae, jointly with one Egger, of a house in Montreal, at a rental of \$240 per annum, and secretly removed the furniture in May to Brockville, where his employer

required him to locate himself for a time as a local agent, at a weekly salary of \$10. He had resided in New York, whence he had removed to Montreal. And it appeared that he had said that if he did not succeed in Brockville, he would move back to the States. His wife had been in the States, in order to get security there for him on behalf of his employer, but had been unsuccessful. He had bought the furniture in Montreal with money advanced by Egger, some \$500. At the time he left in May, he said to Egger that he would try to get bonds for the Brockville office, and if he could not get them, he would try to remain there without bonds, and if he could not remain without bonds, he would go to the States. These facts are proved, and there was no doubt but that McCrae had been unfairly dealt with. These facts prove that McCrae had grounds for believing that Miller might at any time remove into the States, as he had, so far as he was concerned, fraudulently removed from Montreal, without settling with him—secretly taking away his furniture. Is the Court justified in saying that the defendant Miller has not disproved the allegations of the affidavit? The Court holds that the affidavit has not been disproved, and dismisses the petition.

Archibald & McCormick for plaintiff.

Church, Chapleau, Hall & Atwater for defendant.

SUPERIOR COURT.

MONTREAL, October 1, 1881.

Before TORRANCE, J.

CAMPBELL v. McGRAIL et al., and McGRAIL, petitioner for revocation of judgment.

Requête civile—Grounds for revocation of judgment.

This case was before the Court on the motion of plaintiff to reject from the record a *requête civile*.

The action was to recover from defendants as co-partners a sum of \$308. It was begun in December, 1880. The defendants appeared by attorney but did not plead, and were foreclosed from pleading in February, after which plaintiff inscribed the case for evidence *ex parte* on the first March. The defendants were summoned to answer interrogatories on the 7th March, and a default was entered against them for not appearing to answer. The case was inscribed for hearing on the merits on the 8th March for the 14th March. Plaintiff obtained judgment for

\$308 on the 16th March. The petition now in question was filed on the 12th July, and though the judge in Chambers ordered service of petition to be made upon plaintiff or his attorney, the service was only made at the Prothonotary's office. Thereupon the judge ordered a stay of execution. The service and notice was not regular, and the suspension order was in fact made without notice. The chief grievance of defendants by the petition was that they were not allowed to answer interrogatories though they alleged that they offered to do so, and charged artifice against plaintiff and his attorney.

PER CURIAM. The chief grievance of defendant is that he was not allowed to answer the interrogatories on the 7th March. Assuming that the default against him was irregularly entered on that day, of which, we have only his affidavit, he was represented in the case by attorney, and his attorney was duly notified of the hearing on the 14th March, a week after the default complained of, and no step was taken during this week to take off the default. I do not think the case is one in which the judgment should be interfered with. The judgment could not be set aside on such evidence as defendant offers. The plaintiff's motion for the last reason is granted.

J. L. Morris, for plaintiff.

F. Quinn, for defendant.

CIRCUIT COURT.

MONTREAL, Sept. 30, 1881.

Before JOHNSON, J.

HALL v. HARRISON, and STUART, T.S., and HARRISON, opposant and petitioner by *requête civile*.

Opposition—C. C. P. 510.

A person whose interests are affected by a judgment in a cause, to which such person was not made legally a party, may come in by tierce opposition with a view to be maintained in his rights.

JOHNSON, J. There is a good deal of confusion in this record; but I must get at the true state of it, and do substantial justice if I can, without violating any of the laws of procedure in the Circuit Court. There was first an opposition, and afterwards a *Requête civile*, the judgment having been given by default; and it was contended under the opposition, first, that there had been no 'assig nation.' The return of the bailiff shows

this. He says she has no domicile here ; and there is nothing in the record disclosing compliance with the provisions for calling in absent debtors.

This, then, is the case of an opposition by a third person not a party to the cause : that is to say, the defendant was only nominally a party in the case. (See case *Kellond v. Reed*, 18 Jurist, 311; Taschereau, J.'s remarks). There it was held that the opposition would have been the right course. The learned judge observed : " En effet, il n'y a de parties au procès que celles qui ont été sommées d'y répondre, et même le demandeur peut n'y être pas partie, quoique son nom y apparaisse comme demandeur. Or le code, en disant que celui qui a été partie à un procès peut faire révoquer le jugement pour certaines raisons, au moyen de la Requête civile, n'a pas pu vouloir dire qu'il suffisait pour qu'une personne dût être considérée comme partie à un procès que son nom y fût, soit comme demandeur ou défendeur. Ce serait admettre un principe bien dangereux en pratique. Je considère l'appelant comme tierce personne dont les droits sont sérieusement compromis par un jugement rendu dans une cause où elle n'était pas partie, et à laquelle elle n'avait pas été appelée, et comme telle elle tomberait sous l'empire de l'art. 510, C. P. C., qui dit que 'Toute personne dont les intérêts sont affectés par un jugement rendu dans une cause où ni elle, ni ceux qui la représentaient n'ont été appelés, peut y former opposition,' et l'article 512 déclare qu'il est procédé sur la tierce opposition produite comme dans une instance ordinaire." It was objected by plaintiff that the affidavit was insufficient, and that there was no deposit as required by art. 486, C. P. ; but it is not the case contemplated by that article, but a very different case, viz., that of a person who is called a defendant, but who has not been made a defendant by legal summons. The affidavit appears quite sufficient ; and it is to be observed that after joining issue upon this opposition, and going to proof, and in the absence of a motion to reject on either of these grounds, it would seem to be very late to raise the objections.

The *Requête civile* remains, and both these proceedings are before the Court under the inscriptions on the merits both of the opposition and of the *Requête civile*. That is a remedy open to those who are properly parties to the case, and not as here to third parties. The case of *Thouin v.*

Leblanc, 10 L. C. Rep. p. 372, decides the present one in the most direct manner.

Requête civile dismissed with costs.
Opposition maintained with costs.

CIRCUIT COURT.

MONTREAL, Sept. 30, 1881.

Before JOHNSON, J.

PIGEON v. ROUSSIN.—ROUSSIN v. PIGEON.

Lessor and Lessee—Damages.

The lessee has no right of action against the lessor for damages caused by the act or negligence of another tenant in the same building, e.g., damages resulting from a leaking water-pipe in a story overhead, which had been let to another tenant who had abandoned the premises.

JOHNSON, J. In one of these cases the plaintiff asks for a term of rent of a lodging leased to the defendant, and taken by itself there should be judgment in that case for the plaintiff. In the other case the debtor of the rent sues the landlord for damages caused by a flow or leak of water from the pipe in the third story of the building, which had been let to another tenant who had abandoned the place.

The Court has to apply the principles of Articles 1616 and 1617 C. C. to the circumstances of the present case. The language of article 1616 is :—"The lessor is not obliged to warrant the lessee against disturbance by the mere trespass of a third party not pretending to have any right upon the thing leased ; saving to the lessee his right of damages against the trespasser, and subject to the exceptions declared in the following article." The following article is : "1617. If the lessee's right of action for damages against the trespasser be ineffectual, by reason of the insolvency of the latter, or of his being unknown, his rights against the lessor are regulated according to article 1660 ;" and this last article (1660) provides for the cases where there may be either a reduction of the rent, or a dissolution of the lease ; and then the article concludes with these words : "but in either case he has no claim for damages against the lessor."

The present case does not present itself in the form of a defence to the action for rent, nor does it ask in any form for a reduction of the rent or a dissolution of the lease. It is brought independently to obtain damages ; and

the law says there is no action of damages against the lessor. There are decided cases to which I will presently refer; but it certainly struck me at the hearing, and on that account I reserved judgment, that the words in Article 1616, "the trespasser not pretending to have any right upon the thing leased," meant to restrict the action of the lessee against the trespasser to outside trespassers not having any relation with the landlord, nor in any way under his control, for of course it is plain enough that if a stranger comes and breaks your windows, you should have no right to sue your landlord on that account. But here the plaintiff had the ground floor, another had the floor above him, and still another had the third floor, where the pipe burst; and it is said truly enough that there was a kind of control exerciseable by the landlord over his tenants, including this lofty delinquent himself. This argument, however, cannot effect a change in the legal relation and responsibility of the landlord, for on principles well known and treated of in all the books, the landlord is not responsible for *troubles de fait*; though he is responsible for *troubles de droit*. The present case, however, suffers no difficulty. The landlord cannot be answerable in damages at any rate. His relation to his tenant did not make him *garant* for the latter's negligence; and even in the cases where he is answerable, as it was said he was here, for his own act and not the act of his tenant, who, in fact, had left the premises, it can only be in the way of diminution of rent, or dissolution of the lease. Therefore the action of the tenant for damages is dismissed; and there is judgment for the rent due. I have mentioned that there were cases, and they will be found cited under the Article 1616 in the *code annoté* of M. DeBellefeuille. In one of them—the case of *Gallagher v. Alopp* (8 L. C. R., p. 156), it is held that the landlord is not answerable in damages for the act of one of his tenants done to another of them.

The other cases are those of *Hamilton v. Wilson* (2 Rev. de Leg. p. 441), and *Boily v. Vesina* (14 L.C.R. 325), and they related to the acts of third parties not tenants. The whole subject, however, is treated in Moulton, Tom. 3, No. 747.

CIRCUIT COURT.

MONTREAL, Sept. 30, 1881.

Before JOHNSON, J.

THOMPSON et al. v. CITY OF MONTREAL : SHAW v. CITY OF MONTREAL : SIDEY v. CITY OF MONTREAL.

Tax on brokers and commission merchants—Ship Agents.

A ship agent is not subject to a tax imposed on brokers and commission merchants.

JOHNSON, J. The plaintiffs in these three cases have paid under protest a sum of \$50 each, which the Corporation assumed to levy from them under the authority of a by-law. This by-law is No. 94, sec. 12, and in terms prohibits the exercise of either of the following callings, that is to say, those of broker, money lender, or commission merchant, in this city, without a license for which fifty dollars has to be paid.

The parties who sue here all submit their cases upon one and the same statement of facts, and these are, that with the sole exception of Mr. Sidey they are part owners of the ships of which they act as agents here. Mr. Sidey, however, is not an owner, but only the agent of the owners. In other words, the Messrs. Thompson, Murray & Co. and Mr. Shaw are shipowners, and superintend their own business in this city, and Mr. Sidey superintends the business of other shipowners. The first two are, so to speak, their own agents, and Mr. Sidey is agent for other and distinct persons. As regards the first two, therefore, they are only agents in the same way that every active partner in a firm is an agent for the purposes of the partnership (and that, of course, is the law governing the individual members of every firm), and Mr. Sidey is the agent or attorney *ad negotia* of his principals who are not his partners.

The question is whether these facts make either of the plaintiffs liable for the tax; *i.e.*, whether they or any of them are brokers or commission merchants. There are three classes mentioned in the by-law—money lenders, brokers, and commission merchants. The first, of course, is out of the question. Then do these facts, that these parties are ship agents, two of them for themselves, and one for other parties, constitute them brokers or commission merchants? In this country there can be no diffi-

culty in defining who is a broker and who is a commission merchant. We have express law on the subject. Art. 1735 says "a broker is one who exercises the trade and calling of negotiating between parties the business of buying and selling or any other lawful transactions. He may be the mandatary of both parties, and bind both by his acts." Art. 1736 :—"A factor or commission merchant is an agent who is employed to buy or sell goods for another, either in his own name or in the name of his principal, for which he receives a compensation commonly called a commission." It is obvious that the business of these parties is not described in either of the articles of the Code, and I do not think I should make the case any clearer by discussing principles or analogies which the express terms of the law render unnecessary.

I am of opinion, therefore, that the plaintiffs in all these cases are ship agents, and nothing more, for their being owners or not has nothing to do with the question whether they are brokers or commission merchants. The tax is not put on mere agents such as these, but on brokers, a perfectly distinct calling, intermediaries and agents of both parties to a bargain, and upon commission merchants, who by law are those who buy and sell for others; and it cannot be extended beyond those terms to include mere ship agents. Therefore I decline to go beyond the express law; and I neither refer to the case cited from 4 Bingham, nor to the fact which was mentioned, and indeed proved in these cases, that the tax in question has not been levied from agents of the same class in another ward of the city. There is therefore judgment for plaintiffs in the three cases, with costs.

Dunlop & Lyman for plaintiffs.

RECENT DECISIONS AT QUEBEC.

Nuisance—Indictment—B. N. A. Act.—The defendant, agent of the Bell Telephone Co. of Canada, was indicted for illegally erecting three telegraph poles, in Buade street, a leading thoroughfare in the city of Quebec, thereby obstructing the Queen's highway, to the common nuisance of the public.

The Company is incorporated by Act of the Parliament of Canada, 43 Vict. ch. 67, with power to establish telephone lines in the several provinces of the Dominion, and to construct, erect and maintain lines along any public highway,

street, bridge, water-course or other such place, or across or under any navigable waters, either wholly in Canada, or dividing Canada from any other country, "provided that in cities, towns and incorporated villages, the opening up of the street for the erection of poles or for carrying the wires underground, shall be done under the direction and supervision of the engineer or such other officer as the Council may appoint, and in such manner as the Council may direct, and that the surface of the street shall, in all cases, be restored to its former condition by and at the expense of the Company." This charter, and the consent of the city Council, duly obtained, were relied on by the defendant as a plea to the indictment; in the absence of these conditions the poles in question would undoubtedly constitute an obstruction and a nuisance.

It appeared that the business of the Company, in connection with the objectionable poles, was of a purely local character, and confined to the district of Quebec, and it was not declared by the charter to be an undertaking incorporated for the general advantage of Canada.

The jury, under direction of the Court, found a verdict of *guilty*, subject to the question reserved for the determination of the Court *in banco*, whether the said Company had authority under their statute, or were otherwise authorized by law, to place the poles in the said street; and if so, whether the Dominion Legislature had a legal right to grant such authority.

Held, sustaining the verdict, that the establishment of the Company in Quebec, was one purely of a local character and intended to serve local purposes, having no pretension to connect provinces, or even to cross navigable rivers, and of such a nature as to be *ultra vires* of the Dominion Parliament, and falling exclusively within the jurisdiction of the local legislature.

To give the Dominion Parliament the power to authorize the Bell Telephone Company to impede circulation and traffic in the streets of Quebec, one of two conditions would have been required; either the Company should have been incorporated for the purpose of connecting by telephone lines this province with any other or others of the provinces of the Dominion, or of extending its lines beyond the limits of this province; or it should have been declared by parliament to be for the general advantage of Canada or of two or more of the provinces.—*Regina v. Mohr*, Reserved Case, decided by Court of Queen's Bench, 8th June, 1881. 7 Q.L.R. 183.

The Legal News.

VOL. IV. OCTOBER 15, 1881. No. 42.

INSANITY AS A DEFENCE.

In connection with the *Hayvern* case, tried recently at Montreal, in which some rather extraordinary views on the subject of insanity as a defence were put prominently forward in a portion of the medical testimony, it may be interesting to refer to a case decided not long ago by the Supreme Court of Alabama, *Braswell v. State* (reported in 2 Crim. Law Magazine, 32), in which the observations of the Court, and the authorities cited, serve to elucidate the subject. Judge Stone, who delivered the opinion of the Court, quoted the *dictum* of Chief Justice Gibson in *Cane v. Maslu*, 4 Pa. St. 264, that "there may be an unseen ligament pressing upon the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under coercion which, while its results are clearly perceived, it is incapable of resisting," and remarked: "With all respect for the great jurist who uttered this language, we submit if this is not almost or quite the synonym of that highest evidence of murderous intent known to the common law: *a heart totally depraved and totally bent on mischief*. Well might he add: 'The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or, at least, to have evinced itself in more than a single instance.'"

The Court also referred to the case of *McNaghten*, in 1843 (10 Cl. & Fin. 200), which came before the English House of Lords for trial, and their lordships submitted certain questions to the judges, which were answered by Chief Justice Tindal, speaking for all the judges except Mr. Justice Maule. Among the questions were the following:—

1. What is the law respecting alleged crimes committed by persons afflicted with insane delusions on one or more particular subjects or persons? As, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law,

but did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some supposed public benefit.

2. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

3. In what terms ought the question to be left to the jury as to the prisoner's state of mind when the act was committed?

4. If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?

The answer of the judges was as follows:—

"In answer to the first question, assuming that your lordships' inquiries are confined to those persons who labor under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such a crime that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land.

"As the second and third questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between

right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused were conscious that the act was one which he ought not to do, and if that act was at the time contrary to the law of the land, he is punishable, and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course, we think, is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

"The answer to the fourth question must, of course, depend upon the nature of the delusion; but making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of delusion, he supposes another man to be in the act of attempting to take away his life, and he kills the man, as he supposes, in self-defence, he would be exempt from punishment. If his defence was that the deceased had inflicted a serious injury on his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

PUNISHMENT OF INSANE HOMICIDES.

While upon the subject of insanity, we may notice a new system of treating insane homicides which, by a correspondent of the *Kentucky Law Journal*, is said to have been lately applied in France upon a limited scale, but with marked success. "No man can be acquitted of a crime

on account of his insanity, unless, through his counsel, he pleads his insanity. This throws upon him and his counsel the responsibility of accepting the issue,—sane or insane. If he be acquitted because of his insanity, he is confined, not in a common penitentiary (for his confinement is not intended for punishment), nor in an insane asylum, subject to be discharged upon the ready certificate of a physician; but he is imprisoned, at all events, for a fixed time, and is subjected to medical treatment, but, under no circumstances, to a doctor's discharge. Nor is he subjected to hard labor nor to the debasing régime of a common jail. The period of confinement is scaled according to the nature of the offence charged, but in no case is proposed to extend over the prisoner's whole life. If during the prisoner's life his term of imprisonment should expire, he can be released only after his insanity is positively established by evidence to the satisfaction of a number of inquisitors selected with a view to perfect freedom from the influence of the prisoner and his friends. It is the duty of the attorney for the state to oppose the discharge."

APPOINTMENT.—Mr. Mathieu, Q. C., of Sorel, has been appointed a judge of the Superior Court, in the place of the late judge Olivier.

PAROL CONTRACTS OF INSURANCE.

We have received a copy of the decision of the Supreme Court of Missouri, in the case of *Baile et al. v. St. Joseph Fire and Marine Ins. Co.*, decided at the April Term, 1881. This decision is of great importance, the Court laying down the rule, for the first time, that on an oral contract of insurance the assured may, in equity, recover. A somewhat similar case was determined before by the Supreme Court, (*Henning v. United States Ins. Co.*, 47 Mo. 425), which was an action at law to recover on a verbal contract of insurance. In that case, the insurance company's charter provided that "the condition of all policies issued by such company shall be written or printed on the face thereof;" and also that "all policies and contracts of insurance, and instruments of guarantee, made by said company shall be subscribed by the president, or president *pro tempore*, and attested by the secretary." The Court, in that case, held that "corporations, where they are not restrained

in any particular manner by their charter, may adopt all reasonable modes in the execution of their business which a natural person may adopt in the exercise of similar powers"; but, relying on the provisions of the charter above quoted, it was held that plaintiff could not recover on a naked verbal agreement. The same case seems somehow to have got into the Federal Court (*Henning v. United States Ins. Co.*, 2 Dill. 26), and a ruling entirely different was there made, the Federal Court holding that when the charter was granted to the insurance company, the General Statutes of Missouri then in force declared that all charters thereafter granted should, unless otherwise expressed, be subject to the provisions of the general law respecting corporations, and sec. 8, p. 232, of the Revised Code of 1845 declares that "*parol contracts may be binding on aggregate corporations, if made by an agent duly authorized by a corporate vote, or under the general regulations of the corporation, and contracts may be implied on the part of such corporations from their corporate acts, or those of an agent whose powers are of a general character.*" The Federal Court therefore held that "the defendant was not released from, but by implication subjected to, this provision of the general law."

The Supreme Court now hold, in the case first above mentioned, that the ruling of the Federal Court was proper, and that the opinion of the Supreme Court in the case of *Henning v. United States Ins. Co.*, *supra*, was mainly *obiter*, and that in deciding that case, sec. 8, p. 232, of the Code of 1845, above referred to, had been overlooked, although it has been on the statute book for over 35 years. The Court also draws a distinction between that case and the case now decided, on the ground that the former case was a suit *at law* on an alleged oral and completed agreement, while the latter case was a proceeding *in equity* to compel that to be done which already, upon sufficient consideration, had been agreed should be done; and in that view it was unnecessary for the Court to overrule its decision in the previous case. Sherwood, C. J., delivered the opinion of the Court, in very clear and forcible language. Hugh and Henry, JJ., dissented, so that the conclusion reached was only by a majority of one.—*Southern Law Review*.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, Sept. 29, 1881.

DORION, C. J., RAMSAY, TESSIER, CROSS, BABY, JJ.
WINDSOR HOTEL Co. (pliffs. below), Appellants,
and LEWIS et al. (defts. below), Respondents.

Company—Defects in organization pleaded in answer to action for calls.

The appeal was from a judgment of the Superior Court, Montreal, (Rainville, J.) April 30, 1879, dismissing the appellants' action.

RAMSAY, J. The action in this case is for calls on the shares of a joint stock company held by respondents.

They resist the demand on the following grounds: 1st. That the directors represented that the building would only cost \$500,000. 2nd. That the subscription of defendants should not be considered, and that the work should not be commenced, until \$400,000 had been subscribed. 3rd. That they had been induced to subscribe for these shares on the false representation, that certain parties were subscribers who were not really subscribers for the amounts opposite their names. 4th. That the first meeting to elect directors was only to be held when \$400,000 had been subscribed, and when \$40,000 had been paid into one of the chartered banks in Montreal; that the meeting was called on the 9th November, 1875, when \$400,000 were not subscribed, and when \$40,000 had not been paid in. 5th. That the calls were made by persons not authorized to make such calls. The prayer is that the subscription of defendants may be declared not binding on them; that the calls be declared to have been illegally made, and that the action be dismissed.

There is no undertaking in the prospectus that the building will only cost \$500,000. It is only given as the estimated cost of the building. It appears that one of the defendants assisted in the verification of the fact that the \$400,000 were subscribed before the first meeting. In addition to this they have both paid calls. This seems at all events to throw the *onus* of proof on them that the \$400,000 were not paid. On the contrary their evidence goes to show that there were \$400,000 subscribed. We need not then examine what the legal consequences would be if the fact had been established that \$400,000 had not

been paid, and particularly whether it would have relieved one who had participated in the irregularity from paying his calls.

There is no evidence of any special warranty that certain persons would hold the shares. All that the defendants could claim was that \$400,000 had not been subscribed. I may add that no special representations appear to have been made. The objection to the deposit seems to embrace two subjects of complaint—firstly, that there had never been at the time of holding the first meeting \$40,000 actually paid up, inasmuch as \$4,000 was a loan by the Merchants' Bank to the company on the collateral security of the joint note of Messrs. Gibb and Phillips; secondly, that there never had been at any time \$40,000 paid up on the stock at the rate of 10 per cent., and that of the money paid up, portions had been expended properly or improperly by the provisional directors.

With regard to the pretended loan of \$4,000 to the company, I think that it is perfectly established that no such loan took place; that Messrs. Phillips and Gibb obtained the money on their own responsibility; and that it was paid over to the credit of the company. The writing of the word "loan" on the company's pass-book was either an error, or a memorandum; but it certainly did not constitute a title to recover back from the company the amount if the note had not been paid. As a fact the note was paid, and by the parties giving it, within a few days, showing the perfect fairness of the transaction.

The second point turns on the words of the statute. I don't think the statute requires anything more than that \$40,000 shall be paid on account of stock, and that this shall be deposited in a chartered bank. It is not required that the money so paid shall be a tenth of each share. Again, I do not think it was necessary that the whole \$40,000 should remain there until the meeting for the election of directors. The provisional directors were entitled to spend what was necessary for the "management of the affairs of the company," and I do not think that even if they exceeded their powers and expended some of the money in what was not strictly necessary, it would give a shareholder the right to refuse to pay calls, more particularly where the acts of the provisional directors were adopted by the company, as in this case.

The 5th and last objection appears to me to

be only another way of testing respondent's pretensions.

The judgment is as follows:

"Considering that the appellant, the Windsor Hotel Company, has proved the material allegations of its declaration, and namely that the respondents have jointly subscribed for 50 shares in the capital stock of the said company of \$100 per share, and that they are indebted to the said company for seven calls of ten dollars each on the said 50 shares, to wit, for the 4th, 5th, 6th, 7th, 8th, 9th and 10th calls on said stock, said calls amounting to \$3,500;

"And considering that the said defendants have not proved the material allegations of their pleas, and that the said respondents having as shareholders paid the three first calls on the said 50 shares of the capital stock of the said company, part of which were paid after the organization of the said company, cannot now avail themselves of any of the pretended irregularities complained of by their said pleas;

"And considering that there is error in the judgment rendered on the 30th April, 1879, by the Superior Court sitting at Montreal;

"This Court doth reverse the said judgment of the 30th April, 1879;

"And proceeding to render the judgment which the said Superior Court should have rendered, doth condemn the said respondents jointly and severally to pay to the appellant the said sum of \$3,500, with interest on \$500 from 22nd May, 1876; on \$500 from 21st July, 1876; on \$500 from 21st September, 1876; on \$500 from 21st November, 1876; on \$500 from 22nd January, 1877; on \$500 from 21st March, 1877, and on \$500 from 21st May, 1877, until paid; and doth further condemn the said respondents to pay to the appellants the costs incurred as well in the Court below as on the present appeal."

Judgment reversed.

Abbott, Tail, Wotherspoon & Abbotts for appellants.

Edw. Carter, Q. C., for respondent.

SUPERIOR COURT.

MONTREAL, Oct. 11, 1881.

Before TORRANCE, J.

LA BANQUE D'HOCHELAGA v. THE MONTREAL, PORTLAND & BOSTON RAILWAY CO., and THE CONNECTICUT & PASSUMPSIC RAILWAY CO., opposants.

Execution—Seizure of Railway.

Held (following Corp. Co. Drummond & South-Eastern Railway Co.) that the railway of an incorporated company may be seized and sold, in execution of a judgment in favor of a mortgage creditor.

PER CURIAM. The railway of the defendants was taken in execution by the Bank, and the opposants, who were large bondholders holding a mortgage on the road seized, opposed the sale on the ground that the railroad could not by law be taken in execution. The question here was the same question which had been raised and decided in Corporation Co. Drummond and The South-Eastern Railway Company, 3 Legal News, 2, and 24 L. C. J. 276. The plaintiff demurred to the opposition, and the Court here, following the decision referred to, would maintain the demurrer and dismiss the opposition, on the ground that the railway could be taken in execution.

Demurrer maintained.

Lonergan, for opposants.

Beique & McGoun, for La Banque d'Hochelaga.

SUPERIOR COURT.

MONTREAL, Sept. 27, 1881.

Before MACKAY, J.

In re MULHOLLAND & BAKER, insolvents, HENRY MULHOLLAND, petitioner for discharge, and FAIR es qualité, contesting.

Petition for discharge after year—Dividend—Explanation of deficit.

MACKAY, J. Henry Mulholland, one of the bankrupts, petitioned in 1878 for discharge after the year. His creditors have ordered the assignee to oppose, who does so.

The petitioner alleges that he has given all notices and fulfilled all the requirements of the law, and "is now entitled to a discharge."

Upon his petition a day was fixed by himself for proof and hearing, but nothing has been offered by him but proof of notices, and certificate by the assignee of conformity of date 4th November, 1878, more than a month before the date of the petition, which is of 16th December, 1878. The assignee, on the 17th of that month (December), filed a contestation, which at that time, in the then condition of the bankruptcy law, was very likely to be fatal to the petition. It stated that bankrupt's estate had not paid and could not pay 50 cents in the dollar.

I see no answer to that contestation; after it was filed there was supreme quietness until September, 1881. In the interval the legislature changed that requirement of fifty cents dividend, putting the law back to what it had been in respect of dividend required, and making it read to require only thirty-three cents of dividend. As regards dividend, petitioners like the one before us have now to prove dividend of thirty-three cents, or render an account of the deficit. Mulholland must be allowed the advantage of the last legislation, which he must, in common with many others, have hailed with some thankfulness. It was doubtless in consequence of it that in this September he inscribed his petition case for proof and hearing.

The opposition of the assignee for the creditors has some of its force taken from it by the change of the law since it was filed. It stands now as resisting the bankrupt because his estate cannot pay thirty-three cents in the dollar. The law for the petitioner now reads that he must show that his estate will realize thirty-three cents in the dollar or render an account for the deficit; when it appears that the estate has not paid or will not realize thirty-three cents, and account is not rendered in a satisfactory manner for the deficit, the Judge may, in his discretion, suspend or refuse the discharge. The English Act of 1869 in like manner required a dividend to be of ten shillings in the pound. Roche & Haslitt say that this was done to make the bankruptcy proceedings and Court less of a whitewashing machinery. The bankrupt, under the English law, has to prove, and to account satisfactorily for deficit where his estate does not pay ten shillings in the pound. The bankrupt has to account just after that manner here. At the *enquête* he refused to go into proof of anything beyond what was of record. Yet he insists that he is "entitled to discharge." The assignee insists upon the very contrary, and with much force, according to all that usually occurs in such cases. Petitioner had a burden of proof upon him, and does not go into any of some things material. And I see by the paper filed by himself, that he owed debts exceeding four hundred and twenty thousand dollars. He shows no account or reason for the immense loss to his creditors of two hundred and eighty thousand dollars. He will not do it, being put upon notice, as it were, by the contestation and the law's reading. One of

his creditors loses \$4,000 by the bankruptcy, another \$8,000, another \$10,000, one bank \$40,000, another \$18,000, another \$71,000. Surely such creditors are entitled to explanations. These not being made, the petition must be rejected.

Girouard & Wurtele for petitioner.

Bethune & Bethune for contestants.

CIRCUIT COURT.

MONTREAL, Sept. 30, 1881.

Before JOHNSON, J.

LA COMPAGNIE DU CHEMIN DE PEAGE DE LA POINTE
CLAIRE V. VALOIS.

*Corporation—Defects in organization—Action
for calls.*

Defects in the organization of a company incorporated by letters patent cannot be set up by a shareholder in defence of an action for unpaid calls.

PER CURIAM. The plaintiffs sue as a corporation under the 33 Vic., c. 32, which was amended by the 36 Vic., c. 26 (Quebec) to recover \$40, being for three instalments of \$10 each, and interest upon \$100, the amount of his share.

The defendant pleads by exception in substance that the plaintiffs have no corporate existence. That is, as I understand these statutes, he pleads that there are no letters patent, because if the letters patent have been duly issued, the statute says expressly in sec. 7 that "after certain formalities have been observed, and on the report of the Commissioner of Public Works, the Lieut.-Governor in Council may grant to the petitioners by letters patent, under the great seal, a charter constituting them a body politic and corporate for the objects set forth in their petition. In point of fact what was contended by the defendant's counsel was not that there was no corporate power; but that there was deficient organization, in that no directors had been appointed, and that the capital had not been completely or properly subscribed.

Neither the first position, nor the one subsequently taken up are sustained by law. The cases cited, viz., *La Compagnie de Navigation Union v. Rascony* (20 L. C. Jurist, 206), and the case of the *Union Building Society v. Russel*, and *Moran*, opposant, (8 L. C. Rep. 276), are directly in point to the full extent of both grounds taken in the present case. If the argument of the defendant's counsel means anything—and I admit it was a

very able and ingenious one, and meant a great deal—it meant that this corporation was non-existent for the purposes of this suit against the defendant. Now, there are many cases and authorities that might be referred to, but I had a case which I decided in December, 1877, which went fully into the subject—the case of the *Windsor Hotel Company v. Murphy*. I have before me the full notes of my judgment there (1 Legal News, p. 74), and a reference to them now enables me to point out precisely the grounds and authorities upon which I decide the present case, and I therefore give judgment for plaintiffs in the present case for the amount demanded. I see that in a case decided yesterday in the Court of Appeal (*The Windsor Hotel Co. v. Lewis*, ante, p. 331), a similar case to the one I decided, and which had been dismissed in the Court below, the judgment has been reversed, and what I held in *Windsor Hotel Co. v. Murphy* was upheld.

CIRCUIT COURT.

MONTREAL, Sept. 30, 1881.

Before JOHNSON, J.

CORPORATION OF THE VILLAGE OF STE. ROSE V.
DUBOIS.

Municipal front road—Repairs—M. C. 397.

Where a person, who already has a front road on his farm, voluntarily opens another road to the public through his land, such road will be considered a municipal front road under M.C. 397.

PER CURIAM. This is an action of a sort well known, and of constant occurrence under the Municipal Code. The Corporation, under articles 397 *et seq.* of the Code, sue to recover the sum expended in repairing a road, together with 20 per cent on the amount, under art. 398, after notice to the proprietor or occupant by the inspector.

The plea is that this was not a public road and the defendant is not bound to keep it in repair. That he is not proprietor of the adjacent land, and that the road is not a front road. That the plaintiffs had no authority to do the repairs necessary to a road of this description.

The facts are these. The defendant's predecessor was proprietor of a large farm or *terre* at one end of which he was bound to maintain a *chemin de front*, and he opened the present road for the purpose of getting to the station of the

railway, and undertook to keep it in repair, and the defendant purchased a piece of the land adjoining this new road, and which had been subdivided into lots as a speculation. The resolutions of the Council, and the notices required by law in such cases, and the performance and cost of the work of repairing are proved. The question is whether the Municipal Code, in the provisions applicable to these actions generally, applies in the present case, or is to be restricted to the cost of repairs done to *chemins de front* in its first sense, i.e., front roads of farm. The point is a very important one, no doubt; and the defendant relies on art. 825, which says:—"No one is bound to keep in repair on one and the same parcel of land, in a depth of thirty arpents, more than one front road governed by the provisions of this chapter."

It is proved in the case that Rivet and Giguère, the *auteurs* of the defendant, made a regular agreement with the municipality to keep this road in repair, and thereby and on that condition got leave to open it, and it is now contended for the defendant, who purchased from them, that in this deed from Rivet he made no agreement to keep the road in question in repair, and the plaintiffs in the case have never registered the undertaking of Rivet et al., and therefore Dubois, the defendant, who has registered his title without this charge, is free. But it is impossible to hold that the public authority is bound to register its title to the public streets and roads, in whatever way they may have become public property. The formalities once complied with, the public right is vested, and third parties must acquire subject to that right.

The subject is complicated; but I will state as shortly as I can what I consider to be the state of the law. Article 765 states what is a front road: that is, as regards farms and lands of the inhabitants. But if a man, having an extensive farm and a front road to maintain, chooses besides to lay out the back part of his land into lots, and open a road, and undertake to maintain it, there are abundant provisions in this code which give the municipal bodies authority to compel him to keep it in repair, and in his default to do so, to recover the cost of having it done. It is part of Article 765, that "roads in village municipalities are front roads, unless otherwise ordered by the Coun-

cil." Art. 749 lays it down that "land or passages used as roads by the mere permission of the owner are municipal roads," etc. Under Art. 376 "the road inspector is bound to superintend the repairs of local or county municipal roads;" and Art. 397 says that "the road inspector may, without being authorized by the Council, perform or cause to be performed the works required on any municipal front road," etc.; and Art. 399 *et seq.* give the right of action for the cost and the 20 per cent. By Art. 403, "in every such action the evidence of the road inspector, if uncontradicted, is sufficient to prove, 1st, the formalities of notice, etc.; 2nd, the execution and the cost of the works, and, 3rd, that the defendant is the person liable for the same.

All this has been done in this case; and besides all this, there is the agreement of the party to keep up the road; and there would seem to remain only the question or the delusion that because a proprietor is only bound to keep up one front road for his farm, he cannot also give to the public another road through it which he may be bound to keep up by law, besides his own undertaking to do it, and which road when it is once made, is subject to the same rules as to the recovery of the cost of repairs, as the road in front of the farm, which in all cases he is bound to maintain. I must, therefore, give judgment for the plaintiffs for the amount demanded, with costs.

CIRCUIT COURT.

MONTREAL, Sept. 30, 1881.

Before JOHNSON, J.

CHENIER V. CORPORATION OF ST. CLET.

Municipal Corporation—Keeping up fences—Prescription.

The prescription under M. C. 1045 does not apply to an action against a municipal corporation, under M. C. 793, for not keeping up fences.

PER CURIAM. This is another case under the Municipal Code; but here the action is against a municipal corporation for a penalty and damages under art. 793, for not keeping up the fences on a municipal road or *chemin de descente*, which they were bound by *procès verbal* to do.

I feel no difficulty in holding the corporation liable. The only points raised are that the road is not in the corporation of St. Clet, but in that of Ste. Marthe; that the action is prescribed by six months; and thirdly, that the penalty and

the damage cannot be asked by the same action. The first point was explained by the witnesses against the defendants' pretensions; and moreover, these parish municipalities did not exist in 1853, when the *procès verbal* was made. The prescription does not lie. Art. 1045 is what creates the prescription contended for; but it only applies to penalties enacted by by-laws; and art. 1051 expressly says that art. 1045 is not to apply to penalties recoverable under the Code itself; and further that they are recoverable in the same manner as penalties. The case cited as authority is no authority at all, but a mistake. Judgment for plaintiff. Penalty \$5 and \$10 damages; and costs as in action brought.

DECISIONS AT QUEBEC.

Will—Substitution—Registration. Jugé.—1. Qu'une disposition testamentaire par laquelle la testatrice déclare qu'elle entend que tous ses enfants partagent ses biens avec égalité, mais qu'ils n'en auront que l'usufruit leur vie durant à titre d'alimens sans qu'il puisse être saisi, et que la propriété des dits biens est léguée aux héritiers respectifs de ses dits enfans, ne crée pas un legs d'usufruit et un legs de nue-propriété, mais comporte une substitution fidei-commissaire en faveur des héritiers des enfans de la testatrice.

2. Que cette substitution, n'ayant pas été enregistrée, est sans effet envers les tiers, et l'appelante peut invoquer l'absence de cet enregistrement à l'encontre des intimés.

3. Qu'avant la promulgation du Code Civil, la douairière pouvait prendre son douaire subsidiairement sur les biens substitués à défaut d'autres biens libres de son mari, et que, dans l'espèce, l'appelante pouvait réclamer son douaire sur les biens dont son mari était grevé, privativement aux intimés, lors même que la substitution eut été valablement publiée ou enregistrée.

4. Que les intimés n'avaient point pris la qualité d'héritiers du grevé, et qu'ils ne pouvaient rien réclamer dans la propriété des biens qu'il possédait à ce titre, sans être ses héritiers.—*Morasse v. Baby*, (Q B.), 7 Q. L. R. 162.

RECENT ENGLISH DECISIONS.

Criminal Evidence—Confession procured by inducements held out by police officer.—Previously to being given in charge the prisoner was taken into a room where the prosecutor and an inspec-

tor of police were. The prosecutor then said to the prisoner, "He (meaning the police inspector) tells me you are making housebreaking implements; if that is so you had better tell the truth, it may be better for you." The prisoner then made admissions which contributed materially to his conviction upon an indictment for larceny. *Held*, upon the authority of decided cases, that these admissions were inadmissible after the inducement held out in the words "it may be better for you." [The cases referred to sustaining this decision were these: *Regina v. Baldrey*, 2 Den. C. C. 450; *Reg. v. Garner*, 1 id. 329; *Reg. v. Kingston*, 4 Car. & P. 387; *Reg. v. Walkley*, 6 id. 175; *Reg. v. Thomas*, 6 id. 353; *Reg. v. Sheppard*, 7 id. 579; *Reg. v. Jervis*, L. R. 1 C. C. R. 97; *Rex v. Hate*, 11 Cox C.C. 686; *Reg. v. Doherty*, 13 id. 23; *Reg. v. Zeigert*, 10 id. 555; *Reg. v. Reeve*, L. R., 1 C. C. R. 362.] *Crown Cas. Res.*, May 21, 1881. *Regina v. Fennell*. Opinion by Lord Coleridge, C. J. 44 L. T. Rep. (N. S.) 687.

Fraud—Misrepresentations of agent—Rescission of contract.—The defendant's son, acting for the defendant, and with the defendant's authority, represented that certain sheep which he sold to the plaintiff were all right. The defendant had fraudulently concealed from his son that the sheep had the rot, and fraudulently gave the son authority to sell them for the best price, intending that the son should represent that they were sound. *Held*, that the defendant was liable in an action to recover damages for fraudulent misrepresentation. Where a principal purposely employs an agent ignorant of the truth, in order that such agent may innocently make a false statement believing it to be true, and may so deceive the party with whom he is dealing, the representation by the agent becomes a misrepresentation by the principal so as to vitiate the contract. Judgment of Common Pleas Division affirmed. *National Exchange Company v. Drew*, 2 Macq. 145; *Cornfoot v. Fowke*, 6 M. & W. commented on. Ct. of App., Jan. 15, 1881. *Ludgater v. Lowe*. Opinions by Brett, L. J. and Lord Ch. Selborne. 44 L. T., Rep. (N. S.) 694.

GENERAL NOTES.

In the case of *Poulin v. Falardeau*, p. 317, read Sect. 126 for Sect. 135. On page 320, 2nd column, for "Payment" read *Pagnuolo*.

The decease of two members of the bar has to be chronicled this week. Mr. J. H. Filion, of *Sta. Scholastique*, died at the age of 51. Mr. E. G. Penny, the well-known journalist, who died on the 11th inst., was also an advocate,—a student, we believe, of the late Adolphus M. Hart,—but never relinquished his vocation of journalist to practice at the bar.

The Legal News.

VOL. IV. OCTOBER 22, 1881. No. 43.

GAMBLING CONTRACTS.

The Statute book of Illinois contains an Act specifying three offences for which punishment by fine or imprisonment, or both, is provided. The offences are the sale of "options," "forestalling the market" and "cornering" the market. Judge Jameson, in charging a grand jury lately, remarked that all these offences have either in name or in spirit, been always interdicted by the common law, and that of "forestalling" was, at a very early day, made punishable in England by statutes. "Over a century ago," he added, "a movement arose in England for abolishing the restrictions upon the freedom of trade, and these statutes were, as a part of them, repealed; but the common law has remained, both there and in this country, unchanged, though fallen into disuse. The exigencies of the times induced our Legislature a few years since to re-enact the statute against 'forestalling,' and to add to it those touching 'options' and 'corners' which I have read—offences in which the criminal ingenuity of our ancestors seems not to have been equal."

The learned Judge proceeded to define the offences as he understood them, and as some of the terms used, such as "cornering the market," have hardly yet emerged from the vocabulary of slang, a judicial interpretation of them may be useful.

"The first offence," he says, "is the illegal sale of options for future delivery of grain and other commodities. The fact that property is sold to be delivered at a future day does not make the contract illegal; or that it is not at the time possessed or owned by the seller; or that the time of its delivery is left within fixed limits, optional with the buyer or seller, though in one sense any such sale is a sale of an option apparently within the statute. What makes it a gambling contract is the intent of the parties that there shall not be a delivery of the commodity sold, but a payment of differences by the party losing upon the rise or fall of the market. Of this intent the jury are to be the

judges, and it may be inferred directly from the terms of the contract, or indirectly from the course of dealing of the parties: *Pickering v. Cease*, 79 Ill. 328; *Walcott v. Heath*, 78 Ill. 433; *Pixley v. Boynton*, 79 Ill. 351.

"By this legislation the General Assembly had no purpose to interdict *bona-fide* sales of commodities, but only such as are colorable or fraudulent, contrived by both parties as a cover merely for gambling transactions.

"The offence of forestalling originally consisted in the buying or contracting for merchandise or victuals coming to market, or dissuading persons from bringing their goods or provisions, or inducing them to raise their prices. 2 Wharton, Criminal Law, § 1849.

"Our statute has narrowed the offence, so that it covers only forestalling the market by 'spreading false rumors to influence the prices of commodities therein.' The obvious purpose of the Legislature in making this provision was to protect the people, the consumers as well as innocent traders, from the damage resulting from unnatural and fictitious fluctuations of prices, brought about by the false suggestions of interested persons.

"The offence of cornering the market is not, so far as I am aware, mentioned in the books, but it is one of the numerous family of frauds of which the various members in their fight with society assume an infinitude of shapes and colors. To detect and punish these, notwithstanding the novelty and apparent innocence of their disguises, is the first business of courts of justice. The thing which we know as a 'corner' in the market might be briefly described as a process of driving unsuspecting dealers in grain, stocks, and the like, into a 'corral' and relieving them of their purses. The essence of the offence consists in the party securing a contract for the future delivery of some commodity at his option, and then, by engrossing the stock of such commodity in the market, making it impossible for the other party to complete his contract, but by purchasing of his adversary at his own price, or paying in cash the difference fixed by such adversary."

The concluding observations of the Court evinced a disposition to enforce the law, which, if generally imitated, must carry dismay into a good many gambling circles in Chicago and elsewhere. "If the crimes indicated are

being committed," he said, "it imports much that the validity of our statute and its sufficiency to reach the guilty parties should be early tested. If the spread of gambling has infected our business men, the consequences cannot but be disastrous; the course of business, instead of proceeding quietly and healthily, will become broken by fits of fever and panic; unlawful gains will be preferred to the slow profits of legitimate trade; our farmers, partaking of the prevalent spirit, will hold back their crops in expectation of corner prices, borrowing money upon mortgage to carry on their operations, instead of realising by the sales of farm products. It is said that these phenomena are already apparent, and they are charged to be the effects of violations of the law. I will only add that it is not your duty to seek inquisitorially for evidence that crimes have been committed. Should evidence come to you through the regular channels, your duty will be to consider it and act fearlessly and promptly to vindicate the laws. I think I may promise on the part of the judiciary of the county that if you present men for crime it will not go unpunished, so far as the enforcement of the law depends upon them."

TRIAL BY JURY.

In the disturbed condition of society in Ireland during the past year, the judges have had frequent occasion to deplore the unwillingness of jurors to respect their oath and convict the guilty. A special committee of the House of Lords, appointed to inquire into the operation of the Irish jury laws, report that juries in most districts have, during the recent agitation, been guilty of very gross misconduct, limited, however, to crimes arising out of disputes as to the occupation of land; crimes arising out of political or religious antagonism, and aggravated assaults. The report states that though the criminal may have been detected in the act of committing the crime, though he may have been arrested bearing upon his person traces which could leave no doubt as to his guilt, though his identity may have been clearly established, the jury have again and again either disagreed or found a verdict of acquittal. On other occasions the prosecution has been compelled to accept a plea of guilty upon an understanding that the defendants were to be liberated without

punishment on their own recognisances. The committee very naturally remark that it is scarcely possible to conceive a more complete frustration of justice, or one more calculated to demoralize society.

The report suggests several remedies, and among them the extreme one of suspending for a time the right to a jury trial where the disturbing influences exist.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, Sept. 27, 1881.

Before MACKAY, J.

TRUST & LOAN CO. OF CANADA v. THE RIGHT REV. THE LORD BISHOP OF MONTREAL, MUNRO and HUTTON, T. S., and THE SYNOD OF THE DIOCESE OF MONTREAL, intervening.

Powers of Bishop—Authority to bind successors in office.

There were three contestations arising out of the same matter. The Trust and Loan Company in 1875 recovered judgment against Bishop Oxenden in his corporate capacity for the amount of their loan to Trinity Church, the Bishop being vested with the property on which the Church was erected. An attachment was then taken out by the plaintiff in the hands of a number of persons to whom the Bishop had from time to time loaned money in his corporate capacity. In these proceedings the Synod of the Diocese of Montreal intervened, and claimed that all these moneys thus loaned formed part of the Episcopal Endowment Fund, which was vested in the Synod as their property, subject to the trust contained in an indenture executed in 1856, between the Society for the Propagation of the Gospel in Foreign Parts and the Church Society of the Diocese of Quebec and the Church Society of the Diocese of Montreal. Under this indenture the Church Society of the Diocese of Montreal was vested with a certain proportion of funds then held by the Church Society of the Diocese of Quebec, and which was to be paid over to the former after the death of Bishop Mountain. At the time of the execution of that indenture the Church Society of the Diocese of Montreal held from the Society for the Propagation of the Gospel in Foreign Parts the sum of over \$57,000 in trust for and as an en-

dowment of the See of Montreal, and after the death of Bishop Mountain they received, under said indenture, from the Church Society of the Diocese of Quebec an amount of over \$19,000 to be held in trust as an endowment of the said See of Montreal, and under the Act of Incorporation of the Synod the Church Society of the Diocese of Montreal was merged into the Synod and all this property passed to, and became the absolute property of the Synod, subject to the same trust as the Church Society that held the same. In this way it was contended by the intervenant that the whole of the moneys originally held by the Church Society became vested and were the absolute property of the Synod, and included in this property were the said moneys so received from the Society for the Propagation of the Gospel in Foreign parts, and consequently that these moneys were held by the Synod, subject to the trust mentioned in said indenture, and that under said indenture the Synod was bound to pay over to the Bishop, for the time being, of the Diocese, the revenue of such moneys to the extent of \$5,000 per annum.

The Synod contended that the moneys seized under the attachment were in reality the very same moneys that the Synod had become vested with in the manner before mentioned, and, therefore, claimed that the moneys were not liable for the debt on Trinity Church, which was contracted by Bishop Oxenden simply for the purposes and uses of Trinity Church alone, and independently of the property of the Diocese, and under the special authority of the Provincial Statute, 38 Victoria, chap. 63, and that it was incompetent to Bishop Oxenden, to pledge, nor did he pretend to pledge, any portion of the said Episcopal Endowment Fund.

The Right Reverend Bishop Bond also intervened personally, and claimed that the only fund out of which his salary, as Bishop, could possibly be paid was the revenue arising from said loans, and that the same could not be attached under the present proceedings. There was also an incidental point in the case in the shape of a contestation by the plaintiffs of the declaration of James Hutton, one of the *tiers-saisis*.

MACKAY, J., said that the Lord Bishop of Montreal is a corporation sole, and before the Act of 1875 he was vested with the property of Trinity Church. That Church being in pecuniary difficulties, got an Act passed by which a

loan was authorized, and the Bishop authorized to mortgage the church property as security. His Honour could not see that the Bishop had any power at all to involve his successors in office. The Act (38 Vic. c. 63) was a law in favor rather of the minister and church-wardens of Trinity Church; it was they who petitioned for the Act. It was perfectly clear what the object was, viz., that the Bishop might borrow and for security mortgage the property with the consent of those interested, and that upon failure to pay, the church might be seized and taken in execution, and that was all. It did not authorize him to declare that he bound his successors to pay; as he has declared. The Church has been sold at the suit of the plaintiffs, but has not produced enough to pay them in full. There is a deficit, and it is contended that the successors of the Bishop are liable for it, and monies vested in their name are seized. The powers of the Bishop in this province are well known; he cannot borrow without leave. Several instances have occurred of the Roman Catholic Bishops here asking for powers to borrow money; and in France a Bishop can never borrow or mortgage a property which he is holding in trust, without authority. The case of the Synod here was made out, the moneys seized belonging to the Synod of the diocese. The judgment would, therefore, maintain the intervention of the Synod, *mainlevée* being granted as regards the two *tiers saisis*; costs of contestation against plaintiffs in favor of intervenant; "considering that the Synod, intervenant, has proved its material allegations of intervention, and its title to the monies claimed by it, subject, however, to the trust stated in the intervention: considering that under the circumstances disclosed upon the record, the seizure in this cause of monies in the hands of the *tiers saisis* must be declared vain, null and void; considering the contestation by the plaintiff of the Synod's intervention unfounded, and its denial of the Synod's proprietorship unfounded, and so its allegations of simulation and fraud."

Intervention maintained.

*. TRUST AND LOAN CO. v. THE RIGHT REV. THE LORD BISHOP OF MONTREAL, MUNRO and HUTTON, *tiers saisis*, the RIGHT REV. BISHOP BOND, intervenant, and plaintiff contesting.—In this case

Bishop Bond intervened as interested in the fund. He is entitled to the interest of the monies seized, and has a right to have it declared that the interest should be paid him. The petition in intervention by him is maintained, and *main-levée* of the seizure is granted as prayed; costs of contestation by plaintiffs against them in favor of intervenant; considering that the intervenant has proved his material allegations and his interest to have and maintain such intervention; considering the contestation of the said intervention of the Lord Bishop intervenient, unfounded, etc.

TRUST AND LOAN CO. v. THE RIGHT REVEREND LORD BISHOP OF MONTREAL, and HUTTON, et al., *tiers saisis*, and plaintiff contesting.—This came up on a contestation of the declaration of the garnishee Hutton. On similar grounds the contestation must be dismissed, but without costs of this contestation: Considering that the *tiers saisi* has established the truth and sufficiency of his allegations in his answer to plaintiff's contestation of his declaration, considering that the said *tiers saisi* is really debtor only to the Synod of the diocese of Montreal, and it was by error that he obliged himself towards defendant by the obligation referred to in plaintiff's contestation.

Judah & Branchaud for Trust and Loan Co.
Bethune & Bethune for intervenants.

SUPERIOR COURT.

MONTREAL, Oct. 10, 1881.

Before MACKAY, J.

PROVOST v. LA BANQUE D'HOCHELAGA.

Promissory note—Stamps.

An endorser paid to the discounting bank the amount of a note which, as he subsequently discovered, had not on it the proper stamps. It was proved that the note was properly stamped when discounted by the bank. Held, that he had no action to recover the amount of the note from the bank.

PER CURIAM. The action is *en répétition de l'indu*, in other words, for recovery back of a sum (over five thousand dollars) paid by plaintiff to defendant in 1876. The plaintiff had endorsed a note made by Victor Hudon, endorsed first by one Desmarteau. The note went to protest, and defendants made the plaintiff pay it, who at first gave them collateral securities; these

having realised enough, the bank gave up to the defendant the original note during the summer of 1880, when, says plaintiff, I saw that the note had never been stamped, and was, therefore, from the beginning a nullity, and the protest a pullity, and myself never under responsibility as endorser of it; the bank was in fault in not stamping and cancelling stamp on the note as required by law; the note amount was paid before plaintiff discovered the real facts, he says, and the bank has delivered to him a note of no use, to serve against the maker, and the first endorser, inasmuch as it has not been stamped. The payment by me made was null under the Stamp Act, says plaintiff; the civil code treats it as "payment of money not due, and Article 1047 gives me right to have my money restored to me."

The article certainly reads clearly: "He who receives what is not due to him, through error of law or of fact, is bound to restore it." It calls for observation that the plaintiff only commenced his suit in April, 1881, after having had the note in possession probably six or seven months.

The bank pleads that the note was duly stamped and the stamps cancelled, but that they must have fallen off. It also pleads that the note was a renewal of a former one that went to protest, upon which the plaintiff was liable, and can yet be charged, if he succeed in the present suit.

That former note is produced; I notice that it was over five years due at the date of the defendant's pleas. As regards the note filed by the plaintiff, the bank proves it to have been stamped duly at the time of the discounting of it, and two witnesses testify that it bears marks of the stamps having been cancelled duly. The machine, by means of which it is claimed that the defacing was operated, is filed by the bank. For myself I have extreme difficulty to discover the marks of defacing that the witnesses describe. The stamps, supposing them to have once existed, have disappeared, and there is reason for fixing the date of their disappearance at a time before the protest of the note; for the protest is indicative of no stamp, and the notary says that it seems there was none at the time of protest. Here it may be useful to observe that a notary protesting a note which he sees is unstamped shows some in-

difference to the interests of his employers. The inveterate practice of the bank (say two witnesses) was always to see that all notes discounted were duly stamped, and a book exists showing what notes have ever been presented to the defendant's bank unstamped, for discount, and what stamped, and from what appears the note, the foundation of this action, was stamped when presented—so say two witnesses.

Under the 33 Vic., the plaintiff incurred a penalty of \$100 for endorsing, or for paying the note he now sues upon, if unstamped. He had duty, as others had, to see to the stamping of the note. The defendants' bank certainly had such duty, and a penalty was enacted first by the 31 Vic., and afterwards by the 33 Vic., against them if they discounted notes unstamped. The penalty was a fine of \$100 and utter nullity of a note unstamped as required by the statute. But for this enactment of nullity of the note it would be held by some that the nullity did not exist. But we need not go into that particular question. The Promissory Note Act reads:—"After a note requiring to be stamped has been settled, or paid, no penalty shall be enforced against any party thereto, or against any person or corporation, who had been the holder thereof, by reason of such note having been insufficiently stamped, &c., unless it be proved that the party from whom a penalty is demanded was aware, before or at the date of the maturity of such note, of the defect in the stamping, or in the effacing of the stamps thereon, and did not thereupon affix double stamps thereto," &c.

Even in the absence of such particular law, I would pronounce in favor of defendants upon what proofs are of record. But in the presence of it I ask: Has the plaintiff proved that the defendants' bank was aware before or at the date of the maturity of the note referred to in the pleadings in this cause, of the want of stamps, etc.? I do not see it, and I believe that the clause last read by me is to be treated in favor of the defendants, and of persons in their position, and charged as they are in this cause. It was statute law of repose, and meant as such. But for it I have no doubt that hundreds of suits could be invented against banks and others; for very slovenly modes of defacing stamps have been pursued, and the penalties have been ordered as much against

insufficient defacing of stamps as against the total want of them.

Under all the circumstances, I am of opinion that plaintiff's action ought not to be maintained; so it is dismissed with costs.

Peltier & Jodoin, for plaintiff.

R. Laflamme, Q. C., counsel.

Beique & McGoun, for defendants.

SUPERIOR COURT.

MONTREAL, Oct. 12, 1881.

Before TORRANCE, J.

PRATT V. BERGER.

Partnership—Proof of, where not witnessed by a writing.

PER CURIAM. This was a demand for \$8,000, for goods sold and delivered, and materials supplied. The declaration was in the usual assumpsit form.

The plea was to the effect that the contract set out by plaintiff had not existed, but on the contrary, the defendant had employed the plaintiff as a journeyman on wages, and had paid him for his work.

The evidence showed that in 1879, there were tenders asked for the supply of furniture to the Jacques-Cartier School. Both George Pratt, the plaintiff, and Noel Pratt, his father, acting for him, and Berger were desirous of securing the contract as a profitable one. Pratt was an insolvent, but he was a skilled workman, and Berger could supply funds.

Rosaire Thibaudeau deposed that the government were induced to accept the tender of Berger on the representation that Pratt had an interest in it. The work was chiefly done at the workshop of Pratt who now worked in the name of his son, the plaintiff, from whom a full power of attorney was produced. The foreman of Berger took an active part in the superintendence of the work, and both Pratt and Berger superintended likewise. The money and credit of Berger were largely used, and the evidence of several witnesses proved that both plaintiff and defendant represented that they were jointly interested in the fulfilment of the contract and that there was a partnership. The statute of frauds prevents the proof of an agreement for a partnership, but certain facts may be proved from which a partnership necessarily exists. De Villeneuve in his *Dictionnaire du*

contentieux commercial vo. Société, No. 42, "S'il y a eu société *de fait*, bien que non régulière par écrit, * * * nous pensons que la société, nulle pour l'avenir, en ce sens que chacun des associés peut s'en dégager quand il le voudra, produira néanmoins des effets pour le passé en ce sens que les associés se devront respectivement compte, selon les règles du droit commun, des opérations qui ont été faites, de la perte ou du gain qu'elles ont entraîné." It is true that we have rules in our own Code based upon the statute of frauds and the English commercial law, but the same general principle underlies the English rules. Lindley on Partnership has a chapter on the proof of partnerships, and expresses himself in pretty much the same sense as De Villeneuve in these words: "As partnerships very often exist in this country without any written agreement at all, the absence of direct documentary evidence of any agreement for a partnership is entitled to very little weight. As between the alleged partners themselves, the evidence relied on, where no written agreement is forthcoming, is their conduct, the mode in which they have dealt with each other, and the mode in which each has, with the knowledge of the other, dealt with other people. This can be shown by books of accounts; by the testimony of clerks, agents and other persons, by letters and admissions, and, in short, by any of the modes by which facts can be established." Page 94 of edition of 1873.

The Court is not here called upon to say whether there is a partnership, but the evidence abundantly shows that the contract set forth by Pratt has not been proved. Action dismissed.

R. & L. Laflamme, for plaintiff.

Geoffrion & Co., for defendant.

SUPERIOR COURT.

BEAUBARNOIS, Oct. 7, 1881.

Before BELANGER, J.

MATHEWSON v. BUSH; SHOREY et al. v. BUSH;

LAKE ST. FRANCIS NAVIGATION CO. v. BUSH.

Capias after judgment—New Action—C.C.P. 802.

Where a plaintiff has obtained judgment against a defendant, he cannot cause the issue of a capias founded on such judgment, except as an incident in the original cause, and in the same district.

BELANGER, J. Les mêmes questions se présentent dans ces trois causes. Entre autres ques-

tions il s'agit de savoir si un demandeur qui a déjà obtenu un jugement devant la Cour Supérieure à Montréal contre un défendeur, peut, avec une nouvelle poursuite contre le même défendeur, et basée sur ce même jugement, faire émaner un *capias ad respondendum* contre ce défendeur.

Les demandeurs ont poursuivi séparément le défendeur devant la Cour Supérieure à Montréal, et ont obtenu jugement contre lui. Maintenant ils le poursuivent de nouveau pour les montants qui leur sont dus en vertu de ces jugements et documents, et demandent une nouvelle condamnation contre lui, et ils ont en même temps fait arrêter le défendeur sous le prétexte qu'il a caché ses biens et effets en vue de les frauder.

Il me semble que la question n'offre aucune difficulté.

L'article 802 du Code de Procédure Civile qui n'est que la reproduction des anciens statuts, détermine la manière quand et comment le bref de *capias* peut émaner: "Le bref d'arrestation peut être joint au bref d'ajournement, ou émaner pendant l'instance, comme un incident de la cause, il doit dans ce dernier cas être accompagné d'une assignation à jour fixe pour le voir déclarer valable et joindre à la demande principale. Le bref peut aussi émaner après jugement obtenu pour le recouvrement de la dette." Il est évident d'après cet article que le *capias*, soit qu'il émane avec le bref d'ajournement pendant l'instance, ou après jugement, il ne doit toujours être qu'un incident de la cause et doit par conséquent être émané dans la cause même; or, il apparaît par l'affidavit même dans la présente cause et par le bref lui-même, qu'il devra émaner et a été émané non-seulement dans une cause différente, mais même dans un autre district que celui où l'action et le jugement ont été institués et rendus.

Cette raison me paraît tout-à-fait suffisante pour casser le *capias*.

La question a déjà été jugée dans une cause de *Hay v. Caddy*, mentionnée au 3^{me} volume de la Revue de Législation, page 306, dans laquelle il a été décidé que, "a *capias* cannot be obtained in an action founded on a judgment of the King's Bench, Montreal."

Pour cette raison le *capias* est cassé avec dépens.

Quant à la question de chose jugée elle ne peut pas se présenter sur la requête du défendeur, car pour juger cette question il ne suffit pas de voir à l'affidavit qui n'indique pas la nature des conclusions de la déclaration, mais il me faudrait recourir à l'action même, ce que je ne puis faire sur le procédé actuel. Cette question pourra être jugée avec le mérite de l'action d'une manière plus propre.

J. J. MacLaren, for plaintiff in each case.

D. McCormick, for defendant.

COUR DE CIRCUIT.

TEMISCOUATA, Oct. 3, 1881.

Before H. T. TASCHEREAU, J.

BÉRUBÉ v. OUELLET.

Dommages—Responsabilité.

Le demandeur déclare qu'il avait loué une stalle pour son cheval le dimanche dans l'étable de A. St. Pierre. Le défendeur en avait aussi loué une voisine de celle du demandeur du côté nord. La stalle du côté sud voisine de celle du demandeur n'était pas louée. Le 26 décembre 1880, le défendeur est venu avec deux chevaux, en a mis un dans sa stalle louée et l'autre dans la stalle non louée. Après la messe le cheval du demandeur avait la jambe gauche de derrière cassée par les ruades du cheval du défendeur mis dans la stalle du sud, et on fut obligé de tuer le cheval blessé. Le demandeur réclame la valeur de son cheval.

Le défendeur plaide que son cheval était doux, n'a tous les faits, et prétendit que si le cheval du demandeur avait été frappé c'était un accident dont il n'était pas responsable.

La Cour a jugé que le défendeur ayant mis son cheval sans permission dans une stalle non louée voisine de celle du demandeur, était responsable de la perte du cheval du demandeur, vu qu'évidemment, par l'aspect et la position de la blessure, c'était le cheval du défendeur qui avait fait le dommage quoique personne ne l'eût vu faire.

Autorités citées à l'argument :—Art. 1055 C. C. ; Toullier, Délits et quasi délits Nos. 296, 297, 316 ; Sourdat, 2e part., liv. 2, chap. 1er, Nos. 1,453 et suivants.

J. Els. Pouliot, procureur du demandeur.

Pouliot & Pouliot, procureurs du défendeur.

RECENT ENGLISH DECISIONS.

Fraud—When fraud and collusion ground for rescinding public contract—Notice.—A contract entered into by a local board provided that payment for the work executed thereunder, i. e., the making of a reservoir, should be made by instalments upon the certificates of a certain engineer. Several payments had been made when it was discovered that the reservoir would not hold water, and further payment was refused. Thereupon the contractor brought an action against the board for £1067. 11s. 6d., the balance due under the contract, which was stayed however on the board executing an agreement with the contractor, undertaking to pay the sum of £800 at the expiration of six months. The agreement was assigned by the contractor to a bank with whom he had an account, and to whom he was indebted to an amount exceeding £800. Notice of the assignment was given by the bank to the board, and at the expiration of the six months the bank brought the present action against the board to recover the amount secured by the agreement, when for the first time the board denied their liability on the ground that they had discovered that the contractor and the engineer had conspired together to give false certificates ; and that therefore the agreement was one which had been obtained by fraud. *Held*, that the defence that the agreement had been obtained by the fraud and collusion of the contractor was a good answer to the action brought against the defendants. *Held*, also, that there was no obligation on the part of the defendants to give notice to the bank of the discovery of the fraud until steps were taken to enforce the agreement. Ct. of Appeal, April 8, 1881. *Wakefield & Barnsley Banking Co. v. Normanton Local Board*. Opinions by Bramwell and Lush, L. JJ. 44 L. T. Rep. (N. S.) 697.

RECENT UNITED STATES DECISIONS.

Charter-party—Involuntary bailee—Burden of proof of negligence.—If goods are sent out in an outward cargo, and the consignee refuses to receive them, and the master therefore stores them on his vessel ; on the return voyage he is, as to these goods, an involuntary bailee. And in a cross-action to a suit for the freight, or a defence by way of recoupment against the bailee, the burden is upon the bailor to show

that the goods were lost through the negligence of the bailee.—*Mayo v. Preston*, Supreme Judicial Court of Massachusetts. Decided June, 1881.

Rape—Evidence—Reputation for chastity.—In a prosecution for rape the character of the prosecutrix for chastity is involved in the issue, and may be impeached by general evidence of her reputation, but particular instances of criminal connection with other persons than the defendant are inadmissible.—*Commonwealth v. Harris*, Supreme Judicial Court of Massachusetts, June, 1881.

Action by female servant against master for persuading her to illicit intercourse.—A master persuaded his female servant to have sexual intercourse with his minor son, to whom she was at the time engaged to be married. The son afterwards refused to fulfil his engagement. Held, that these facts afforded the servant no ground of action against the master.—*Jordan v. Hovey*, 72 Mo. Reports.

Bills and Notes—Undisclosed principal—Intended corporation.—If an agent authorized to execute a promissory note executes it in his own name, whether he discloses his agency or not, his principal may be sued on the note, unless it is clear that both parties to the note intended that the agent alone should be liable; and parol evidence is admissible to prove the intent. In this case members of a Masonic lodge which had made an abortive attempt to become incorporate, were held liable upon a note executed by the officers of the lodge for the purposes of the lodge, with the approval of the members.—*Ferris v. Thaw*, 72 Mo. Rep.

Husband and Wife—Agreement to dissolve marriage contract.—An agreement between husband and wife, having for its object a dissolution of the marriage contract, is contrary to sound public policy; and a note and mortgage, executed in pursuance of such an agreement, are illegal and void.—*Cross v. Cross*, Supreme Court of New Hampshire, 58 N. H.

GENERAL NOTES.

The London *Law Times* says: "The law with regard to bees is rather peculiar. A dispute as to the ownership of a swarm came recently before Mr. W. F. Woodthorpe, the judge of the Belper county court, and it was contended that, being *ferre nature*, there could be no property in them, and that therefore the

plaintiff, from whose land they had strayed to that of the defendant, could not demand their return or damages for their loss. It was proved, however, that the plaintiff had followed the swarm on their departure from his own land, and had not lost sight of them until he saw them alight in the defendant's garden. On the strength of the following passage from Blackstone (vol. ii. p. 352): "Bees are *ferre nature*, but when hived and reclaimed, a man may have a qualified property in them, by the law of nature as well as by the civil law. Reclamation, that is, hiving or including them, gives the property in bees, for though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in birds which make their nest thereon; and therefore, if another hives them, he shall be their proprietor; but a swarm which fly from and out of my hive are mine so long as I can keep them in sight and have power to pursue them, and in these circumstances no one else is entitled to take them," judgment was entered in favor of the plaintiff for the amount claimed as the value of his trust bees."

Judge Clifford died on the 25th Aug., at Corinth, Me. He was born in New Hampshire in 1803. He removed to Maine in 1827. He served three terms in the Legislature of that State, two as speaker. He was attorney-general of that State four years. He served two terms as representative of that State in Congress under President Polk. He was attorney-general, commissioner to arrange the treaty with Mexico, and minister to that country. In 1838 he was appointed associate justice of the Federal Supreme Court, and sat on that bench until last October. He was also a member of the Electoral Commission. He suffered a paralytic shock last October, but the immediate cause of his death was an injury to his foot, causing gangrene and necessitating amputation. He was a man of pure character and considerable technical learning. His great industry, experience and familiarity with Federal questions made him a valuable adviser on the bench. His mental faculties have for some time been clouded, but in his best estate he was not a great lawyer. He has faithfully discharged his onerous duties, but he made them much more onerous than was necessary. He loaded the books and vexed the profession with long and tedious opinions on trite subjects, especially in his later years. He was of a school of judges quite apt to flourish and very useful in a new court and community, but quite out of place on the bench of the highest court in the country.—*Albany L. J.*

ECCENTRIC BEQUESTS.—A Manchester lady bequeaths a surgeon £25,000, on condition that he should claim her body and embalm it, and "that he should once in every year look upon her face, two witnesses being present." Another lady, of an economical turn of mind, desires that if she should die away from Branksome, her remains, after being placed in a coffin, should be inclosed in a plain deal box, and conveyed by goods train to Poole. "Let no mention," she states, "be made of the contents, as the conveyance will not be then charged more than for an ordinary package." A French traveller, recently deceased, desired to be buried in a large leather trunk, to which he was attached, as it "had gone round the world with him three times;" and an English clergyman and justice of the peace, who at the age of eighty-three had married a girl of thirteen, desired to be buried in an old chest he had selected for the purpose. Tastes differ in the matter of burial. One man wishes to be interred with the bed on which he has been lying; another desired to be buried far from the haunts of man, where nature may "smile upon his remains;" and a third bequeaths his corpse for dissection, after which it is to be put in a deal box and thrown into the Thames. One man does not wish to be buried at all, but gives his body to the Imperial Gas Company, to be consumed to ashes in one of their retorts; adding that should the superstition of the times prevent the fulfilment of his bequest, his executors may place his remains in St. John's Wood Cemetery, "to assist in poisoning the living in that neighborhood." A person may approve of cremation himself, but it is a little hard when he requires his relatives to approve of it also.—*The Spectator*.

The Legal News.

VOL. IV. OCTOBER 29, 1881. No. 44.

LEGAL PROCEDURE IN ENGLAND.

On the 7th of January last, the Lord Chancellor addressed to the Lord Chief Justice of England a letter, requesting him to preside over the committee "to consider and report upon any changes which it may be desirable now to make in the practice, pleading, or procedure of the High Court of Justice in connection with or consequential on the union of the Queen's Bench, Common Pleas, and Exchequer Divisions (if such union shall take place under the Order in Council of December 16, 1880) or otherwise, and also how far it may be expedient to limit in any aspect any rights of appeal at present existing;" and upon obtaining the Lord Chief Justice's consent, requested the late Lord Justice James, Sir James Hannen, Mr. Justice Bowen, Lord Shand, the Attorney-General, the Solicitor General, Mr. (now Mr. Justice) J. C. Mathew, Mr. R. T. Reid, Mr. John Hollams, and Mr. Charles Harrison to serve upon the committee. The Lord Chancellor added that such of the recommendations which the committee might make as could be carried into effect by rules must, of course, be submitted at the proper time to the Committee of Judges appointed to make rules under the Judicature Acts.

In compliance with the Lord Chancellor's request, the committee, so constituted, proceeded to consider in numerous sittings the matters referred to them, and in the month of May presented to the Lord Chancellor a report, unanimously signed.

The Lord Chancellor, desiring to have the advantage of the confidential opinions of those learned judges who were not members of the committee to assist him in his further consideration of the subject, circulated the report with that view among their lordships. Before all the observations were received, the members of the committee intimated that it is desirable the terms of their report should be generally known to the legal profession and the public. It has been published accordingly.

There are several points in the report which are of interest here. Although much has been done to simplify procedure in England within the last forty years, and especially by the recent Judicature Acts, the committee are prepared to go much further in sweeping away technicalities. Firstly, they would do away with pleadings wherever it is possible to dispense with them. They see no necessity for a declaration even, unless the case is really going to be fought out. We quote from the report:—

"The committee had, in the first place, to consider how far it was desirable, in order to expedite the proceedings in an action, to combine with the writ of summons a statement of the plaintiff's demand to which the defendant, when he appeared, might be required to put in his answer."

The committee directed an examination to be made of the judicial statistics for 1879, with the view to the solution of this and the other questions relating to procedure submitted for their consideration, and the following results have been arrived at:—

"In the year 1879 there were issued in the divisions of the High Court in London—writs' 59,659. Of the actions thus commenced, there were settled without appearance, 15,372—i.e., 25·68 per cent.; by judgment by default, 16,967—i.e., 28·34 per cent.; by judgment under Order XIV., 4,251—i.e., 7·10 per cent.; total of practically undefended causes, 36,590—i.e., 61·12 per cent.; cases unaccounted for, and therefore presumably settled or abandoned after some litigation, 20,804—i.e., 35·10 per cent. The remaining cases were thus accounted for:—Decided in Court—for plaintiffs, 1,232; for defendants, 521; before Masters and official referees, 512—total, 2,265;—that is, 3·78 of the actions brought.

"From these figures it seemed clear that the writ in its present form was effective in bringing defendants to a settlement at a small cost, and that it was unadvisable to make any alteration by uniting with it a plaint or other statement of the plaintiff's cause of action, which would add to the expense of the first step in the litigation."

In the next place the committee considered how far it was possible, in those cases in which litigation was continued after the appearance of the defendant, to adopt a procedure (1) for ascertaining the cases in which there is a real controversy between the parties; (2) for diminishing the cost of litigation in cases which are fought out to judgment. They arrived at the following conclusions:—

"The committee is of opinion that, as a general rule, the questions in controversy between litigants may be ascertained without pleadings.

In the 20,804 cases which, as appeared from the statistics of 1879, were either settled or abandoned without being taken into Court, it may reasonably be supposed that pleadings were of little use. Of the cases which go to trial it appears to the committee that in a very large number the only questions are—Was the defendant guilty of the tortious act charged, and what ought he to pay for it; or did the defendant enter into the alleged contract, and was it broken by him? And in a great many others the pleadings present classes of claims and defences which follow common forms. We may take, for instance, the disputes arising out of mercantile contracts of sale, of affreightment, of insurance, of agency, of guarantee. The cases of litigants are usually put forward in the same shape, the plaintiff relying on the contract and complaining of breaches; the defendant, on the other hand, denying the contract or the breaches, or contending that his liability on the contract has terminated. The questions in dispute are, as a general rule, well known to the plaintiff and the defendant. It is only when their controversies have to be reproduced in technical forms that difficulties begin.

On this they base the following recommendations:—

"1. The plaintiff shall on his writ indorse the nature of his claim, in a manner similar to that in use on indorsed writs at present. The defendant, shall, within, say, 10 days after appearance, give notice of any special defences—such as fraud, the statute of limitations, payment, &c., after which the plaintiff shall give notice of any special matter by way of reply on which he intends to rely.

"2. Every action shall be assigned to a particular Master's list. At any time after the writ, appearance, and time for notice of defence, a summons (hereinafter called a summons for directions) may be taken out by either party before the Master to whom the cause is assigned for directions as to any one or more of the following matters:—Further particulars of writ, further particulars of defence or reply, statement of special case, venue, discovery (including interrogatories), commissions, and examinations of witnesses, mode of trial, (including trial on motion for judgment and reference of cause), and any other matter or proceeding in the action previous to trial.

"3. No pleadings shall be allowed unless by order of a Judge.

"The existing practice of requiring a separate summons for each separate matter shall be discontinued; and upon any summons by either party, it shall be competent for the Judge or Master to make any order which may seem just at the instance of the other party.

"5. Any application which might have been made upon the summons for directions shall, if granted upon any subsequent application, be granted at the costs of the party so subsequently

applying, unless the Master or Judge otherwise direct."

An important feature of the report is the method suggested for the purpose of avoiding the adduction of useless evidence. "Great expense," say the committee, "is now frequently caused by the proof of facts, about which there ought to be no dispute, and if provisions are made for enabling a litigant to give notice to his opponent to admit particular facts and rendering the party improperly refusing liable to costs, we think unnecessary expense might often be prevented." To deal with this matter the following resolution was passed:—

"7. The recommendation of the first report of the Judicature Commission (p.14), with reference to parties being required to admit specific facts, ought to be carried into effect—viz., if it be made to appear to the Judge, at or after the trial of any case, that one of the parties was, a reasonable time before the trial, required in writing to admit any specific fact, and without reasonable cause refused to do so, the Judge should either disallow to such party or order him to pay (as the case may be) the costs incurred in consequence of such refusal."

Another interesting feature of the report is the suggested doing away with juries in a great many cases in which they have always hitherto been had in England. This, if carried out, would approximate the English system more nearly to our own.

"To the existing modes of trial—viz., by Judge, by Judge and jury, by referee—we propose to add a power to the Master to direct a motion for judgment, where the rights of the parties are found to depend wholly or in part upon matters of law, and when there is no serious controversy as to the facts. This method of proceeding is used in the Chancery Division and in the Bankruptcy Court, and we believe that in many cases in the Queen's Bench Division it would be found to be convenient and expeditious.

"With a view to uniformity of procedure in the different divisions of the High Court, we recommend that, in the absence of directions to the contrary, the mode of trial shall be by a Judge without a jury. Experience shows that a large proportion of the cases that go to trial are unfit for the consideration of a jury, and in consequence great expense, delay, and inconvenience are occasioned. By the provision in No. 12, limiting the right of a party to demand a trial by jury, we desire to prevent what is now often felt to be a scandal—viz., that the parties go down to trial with all their witnesses and deliver their briefs, and then are coerced into a reference; the Judge, the Jury, and counsel all feeling that a jury is wholly incompetent to deal satisfactorily with the matter.

"We think that before a case is directed to be tried by a jury the Master should be satisfied that the case is one to which that mode of trial is best adapted. To this general rule we consider that there ought to be certain exceptions in the instances we have named.

"12. The mode of trial shall be by a Judge without a jury, but, on the summons for directions, on the application of either party, an order shall be made that the cause be tried by a jury, if it shall appear that the questions involved can conveniently be so tried; provided always that in the following cases the right of either party to a trial by jury shall be absolute—libel, slander, seduction, false imprisonment, malicious prosecution, breach of promise of marriage."

With reference to new trials, the report has the following:—

"The recommendation embodied in the following resolution (No. 18) may appear to confer a new and large power upon a Judge who tries a cause, but it does so in appearance rather than in reality. Without saying that at present when a Judge is, and expresses himself as being, dissatisfied with a verdict, the verdict is *never* upheld, it is now certainly, and has been ever since any of us have known the profession, the general rule, acted upon in the vast majority of cases, to set aside the verdict when the Judge so reports. And it has seemed to us, upon consideration, better to give to a Judge the power, subject to appeal, of doing that openly, directly, and inexpensively which, in the vast majority of cases, he really does now, but not openly, not directly, nor till after (in many cases) very considerable and useless expense to the parties:—

"18. After the trial of any cause before a Judge and jury, the Judge may, upon application, certify that he is dissatisfied with the verdict, in which case a new trial shall take place unless the Court shall otherwise order.

"The following resolution was passed with the object of avoiding a new trial of the cause when the ground of objection is that the questions put to the jury have not exhausted the whole controversy between the parties.

"19. Neither party shall have a right to a new trial on the ground that some question has not been left to the jury which the Judge at the trial has not been asked to leave to the jury. The Court shall have power in such cases either to direct a new trial, or, with the view of saving a further trial, to draw all inferences of fact, or take further evidence, or direct inquiry.

A very reasonable recommendation is that which proposes to tax the costs on a lower scale where the amount recovered is less than £200. At present the costs in the smaller actions in the Court of Queen's Bench are often four times larger than the sums in dispute.

The report concludes with suggestions for the diminution of appeals. We find the Committee

strongly condemning the multiplication of tribunals of appeal, and they propose:—

"21. All appeals from a Judge without a jury shall be to the Court of Appeal; and also where a Judge has directed a verdict for plaintiff or defendant; and the Court of Appeal shall thereupon have power to dispose of the whole case.

The following observation might apply with equal force to our Court of Review and Court of Appeal system:—"That three Judges should overrule the judgment of one Judge is natural and intelligible enough, and no one objects to it; but that three Judges in one room should be overruled by three other Judges sitting in another, is not, we believe, satisfactory to the public or the profession."

PROOF OF NOTARIAL INSTRUMENTS IN CRIMINAL CASES.

Members of the notarial profession complain of the inconvenience they suffer occasionally in being obliged to attend Criminal Courts merely to produce their original deeds and prove the authenticity of official copies. It is suggested that no harm would result if copies, which are as authentic as the originals, made proof of their contents in criminal as well as in civil matters. Our criminal law, borrowed from England, does not give the same authenticity to certified copies of notarial instruments as the civil law introduced from France, where notaries are, as in this Province, a recognized profession. To this accident of the two-fold source of our law is traceable the different practice of our civil and criminal courts on this question.

In a recent case, *Kerby v. Thayer*, in the Court of Queen's Bench, Mr. Justice Monk permitted a considerable divergence from the general rule of evidence in this matter. Mr. Cushing, a notary, having declared that he had no authority to produce the original deeds of Mr. Hunter, his partner, absent in England, the Court admitted the copies as proof of the original acts, upon the mere attestation of the witness as to the notary's signature on the copies, and the production of the originals was dispensed with. The reasonableness of this ruling is obvious, and if the members of the notarial profession were to make proper representations on the subject, the existing criminal law would perhaps be modified so as to accord to copies of their instruments in criminal trials, where no special reason exists for the production of the originals, the authenticity allowed to them by the civil law.

LORD JUSTICE BRAMWELL AND THE AMERICAN BAR.

A contributor to the *Central Law Journal* of St. Louis recently wrote an article in that journal sustaining the view of Lord Justice (then Baron) Bramwell, expressed in *Osborne v. Gillett*, 42 Law J. Rep. Exch. 53. In that case the learned Baron held that an action was maintainable by a father for negligence, whereby "the plaintiff's daughter and servant" was killed. Chief Baron Kelly and Baron Piggott, on the other hand, held that the maxim *actio personalis moritur cum persona* applied. A copy of the article was sent to the Lord Justice, who acknowledged it in a letter to the writer. Inclosed was a photograph of the learned Lord Justice in his judicial wig and robes, which, it is said, "gave the picture a very unique and antiquarian appearance to cis-atlantic professional eyes." The letter was as follows:—

"Four Elms, Edenbridge, Kent, June 26, 1881.
Dear Sir,—I am much obliged to you for the number of the *Central Law Journal*. I have read your article with great interest. I am glad to see that on your side of the Atlantic the law is dealt with on higher considerations than profit and loss. I am somewhat ashamed to think that you, for mere love of our science, have brought more research and learning to bear on the question you discuss than I did when it was before me as a matter of duty. I am prone to decide cases on principle, and when I think I have got the right one (I hope it is not presumption), like the Caliph Omar, I think authorities wrong or needless. However, it is gratifying to be confirmed by them, as you confirm my opinion in *Osborne v. Gillett*. I am also very much gratified by the kind and flattering way in which you speak of me. Perhaps the reason you know me in America as well as you do is the length of time I have been on the Bench—twenty-five and-a-half years—longer than anyone else now living by about four years, so that I have had the time to be more chronicled than anyone else, and I suppose I have made an average use of it. I can assure you I am very glad to have the good opinion of lawyers on your side of the water, none the less that they are young. I may, without vanity say, that all the 'young ones' at our bar consider me their particular friend. I was in your city in 1853 only one night, during a Long Vacation ramble; but for the twenty-five and

a-half years, and about 48 more, I would pay the States another visit. Repeating the expression of pleasure at your communication, yours faithfully, G. BRAMWELL."

The London *Law Journal*, in connection with the above letter, refers to the retirement of the Lord Justice: "The 'young ones' at the bar, where youth is perdurable, will be glad to learn that their regard for the Lord Justice is appreciated by him. All are sorry to know that the Lord Justice is about to 'burn all the books' for a different reason than that of Caliph Omar."

THE ARREST OF MR. PARNELL.

To the Editor of the LEGAL NEWS:

SIR,—The question of the legality of the arrest of Mr. Parnell, and other Irish agitators, is one which may fairly be discussed in a legal journal. Simple as the question is in itself, it is so surrounded by political and party exaggeration, that there is some difficulty in so dealing with it as not to lose sight of its purely legal side, which alone should occupy us, without leaving a false impression of the writer's views on the merits of the whole subject. In what follows I shall endeavor, as far as possible, to avoid both difficulties.

At Leeds, Mr. Gladstone denounced Mr. Parnell as a robber; and, at Wexford, Mr. Parnell retorted on Mr. Gladstone, describing him as a false philanthropist, and something very nearly akin to a political charlatan. Mr. Parnell was then arrested. If the motive of the arrest was that Mr. Gladstone did not like Mr. Parnell's personal criticism, it shows how little real liberty has gained by the transfer of power from the hands of an absolute prince to those of a popular leader. If it was because Mr. Parnell's agitation against the Land Bill threatened to deprive that measure of the only argument (and a very bad one) in its favor, then the act is prompted by the most flagitious motive conceivable. Mr. Parnell has just as much right to *stump* Ireland against the new Land Act as Mr. Gladstone had to agitate against the old one, to speechify in Scotland, or to make his nautical expedition round Ireland. So far as robbery goes, the difference between the two agitators is precisely the same as that which exists between the highwayman who leaves the lady he has robbed her wedding-ring and five shillings to pay her postillion, and the

highwayman who turns out her pocket and takes everything. If, then, Mr. Gladstone has some slight advantage over his rival, in this that his confiscatory projects are the less plenary of the two, from another point of view the position of Mr. Parnell is more logical than that of Mr. Gladstone. The former says, in effect, the whole condition of Ireland is so bad, she has been, and is, so mis-governed and oppressed, that we are justified in revolution. Mr. Gladstone, on the other hand, denies all this, but says that Ireland is passing through a crisis which justifies a partial confiscation. Taking it for granted that Mr. Parnell's statement be true, his argument is a good one. It will hardly be denied that there are conditions so unbearable that they justify revolution. But to take the property of one class to give it to another in a moment of distress, is an expedient by no means new, but which, in all ages, has been considered atrocious.

I do not, of course, agree with Mr. Parnell in his appreciation of the position. For more than fifty years Ireland has had no grievance to complain of. The absurd outcry against the land laws demonstrates how completely the political agitator is at a loss for a real grievance. The Irish land laws do not differ materially from those of other parts of civilized Europe. To pretend that the agricultural backwardness of parts of Ireland is due to the land laws is an imposition too transparent to delude anyone. If it were so, the backwardness would be general, which it is not. A large part of the country is so well cultivated, that, in spite of the improvident manner in which the rest is managed, Ireland comes next after England and Scotland, and not much after, in its rate of production of wheat to the acre. Everyone knows that it was the improving landlord—he who sought to apply commercial principles to agriculture—who was shot at. It is, therefore, an assertion as reckless as anything to be found in Mr. Gladstone's pamphlet on Bulgarian atrocities, or in his denunciations of the Government of Austria, to maintain that the Irish tenant has been prevented from making improvements by the land laws or even by the land system, except in so far as the land system has been created, or, at any rate, perpetuated by his own improvidence and obstinate opposition to progress.

But allowing, for the sake of argument, that Mr. Parnell's position is defensible from a moral point of view, what ground can there be for pretending that his arrest is *illegal*? His ethical defence is, "I am forced into revolution," and that being the case, he is infringing the law. It is not the Coercion Act alone he has set at defiance. The avowed purpose of himself and his associates is to alter the Constitution by driving the landlords out of possession of their property by vexation and annoyance. As a matter of fact, there can be no real difficulty in tracing the connection of the Land League and its supporters with much of the agrarian crime, and particularly that organized kind which has obtained the name of "Boycotting." An organization to prevent one man working for another, or to prevent a shop-keeper dealing with anyone, is, to all intents, a conspiracy, and one of the most objectionable kind. It is not less a conspiracy to agree not to pay rent. In a burst of eloquence of almost a national type, Mr. Parnell exclaimed, "It is as lawful not to pay rent as to pay it." It is vain to reason with wilful unreason. No one is so stupid as not to perceive that the failure to fulfil an obligation is as illegal as wrong-doing.

If Mr. Parnell desires to secure for himself any portion of the sympathies of those who are at once honest and intelligent, he will do well not to run two hares at a time. As a daring revolutionist, he may hope to be a hero of romance; but the pretention that his arrest is illegal is a foolish pretext.

R.

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, Sept. 30, 1881.

JOHNSON, RAINVILLE, JETTÉ, J. J.

[From S. C., Montreal.

LECLERC et vir v. THE MUTUAL LIFE INSURANCE Co. of JOLIETTE.

Procedure—Closing enquiry.

The judgment inscribed in Review was rendered by the Superior Court, Montreal (Mackay, J.), July 4, 1881.

JOHNSON, J. Judgment was given in this case for the plaintiff; and the Insurance Company inscribes for review, not because by the evidence given in the case they ought not to have been

condemned; but because they failed in an endeavour to put off the case when it was called for final hearing, and also failed in an attempt to get the *délibéré* discharged and to re-open the *enquête* after the hearing, both attempts—the one by motion and the other by petition—being unsuccessful. The case went to evidence before a *commissaire enquêteur* at Malbaie; and we have had of course to put ourselves in the position of the learned judge who decided the motion and the petition, and if we saw that they ought under the circumstances to have been granted, we should have to say so; but we see very distinctly that the defendants are in default; that they were duly notified to proceed, and neglected to do so, and the *enquête* was declared closed. Therefore there was no ground for granting the defendant's motion, or his subsequent petition, and the rejection of them was right; and the judgment on the merits was a matter of course, and must be confirmed, and it is confirmed with costs.

Ouimet & Co., for plaintiff.

Church & Co., for defendants.

COURT OF REVIEW.

MONTREAL, Sept. 30, 1881.

JOHNSON, MACKAY, RAINVILLE, JJ.

[From S. C., Terrebonne.

SICOTTE v. BRAZEAU, and PREVOST et al., *avocats distrayants*, SICOTTE, opposant, and PREVOST et al., contesting.

Procedure—Désaveu—Party.

The case came up on the inscription of the opposant from a judgment of the Superior Court, Terrebonne, (Bélanger, J.), Jan. 24, 1881.

JOHNSON, J. This was an *action hypothécaire* brought in the name of the plaintiff against the defendant, and which was dismissed with costs against the plaintiff of record; and the defendant's attorneys, as *avocats distrayants*, took out execution against the plaintiff's property, and the latter now comes into court by opposition, and asks that all the proceedings may be set aside as regards him.

It appears to the court *in limine* that whether we regard the opposition, the notice to Mr.

Champagne, and the affidavit, as tantamount to a *désaveu* or not, (and this is, of course, a question upon which we abstain from expressing any opinion whatever), both the opposant and the *avocats distrayants* who contest his opposition have fallen into a wrong course as regards one of the principal parties interested; that is Mr. Champagne himself. It was he who was interested in contesting this opposition. It is he whose rights are guarded by the law; whether we consider the present proceeding as involving a *désaveu* or not. It is he with whom the opposant is waging the right which he sets up. He says to him: "You had no authority from me; your acts do not bind me;" therefore, it is he, Mr. Champagne, who must answer this, and the *avocats distrayants* are in no position to urge the answer that Mr. Champagne may have to make. We think, therefore, that this record should be remitted to the Court at Ste. Scholastique, and we put Mr. Champagne under an order to answer the opposition within eight days.

Mercier & Co., for opposant.

Prévost & Co., for contestants.

COURT OF REVIEW.

MONTREAL, Sept. 30, 1881.

JOHNSON, MACKAY, RAINVILLE, JJ.

[From C. C., St. Francis.

RICE v. LIBBY, and ANDROSS, plaintiff *par reprise* v. LIBBY.

Death of defendant after inscription in Review—Taking up instance.

The inscription was by the defendant Libby from a judgment rendered by the Circuit Court, St. Francis, (Doherty, J.), May 30, 1881.

JOHNSON, J. This case was inscribed for Review by the defendant, Wesley Libby, who subsequently died. The plaintiff now moves that proceedings be stayed until the *instance* has been taken up, and he has given notice to the defendant's attorneys, and produces the *extraits mortuaires*. We are of opinion that this motion must be granted, and therefore the record must go back to the jurisdiction where the necessary proceedings can be had. We reserve the costs.

Bélanger & Co., for plaintiff.

Brooks & Co., for defendant.

COURT OF REVIEW.

MONTREAL, Sept. 30, 1881.

JOHNSON, MACKAY, RAINVILLE, JJ.

(From S. C., St. Francis.

In re McLELLAN, insolvent, HALE, petitioner,
and McLELLAN, Respondent.

Review—Deposit—Writ of possession.

The review was from a judgment of the Superior Court, St. Francis, (Doherty, J.), July 2, 1881.

JOHNSON, J. Hale, the petitioner, was *adjudicataire* of a lot of land brought to sale by the assignee of the insolvent, who could not give him possession, and Hale applied for and got a writ of possession from the Court. It is from the judgment granting the writ that the present inscription is taken, the petition having been contested on a variety of grounds, and evidence having been heard. The petitioner for the writ now moves to reject the inscription, on the ground that the deposit of twenty dollars made with the inscription is insufficient; and his contention is that under article 497 of the Code of Procedure the deposit should have been of forty dollars. That article provides that the review cannot be obtained until the party demanding it has deposited in the office of the Prothonotary of the Court which rendered the judgment, and within eight days from the date of the judgment, twenty dollars, if the amount of the suit does not exceed \$400, and of forty dollars, if the amount of the suit exceeds \$400, or if it be a real action, &c. The argument is that this is a real action; but we think we must look at this subject with reference to the reason of the rule, and refuse the motion. The article 497 I have given the substance of, but it adds expressly that "the amount thus deposited is intended to pay the costs of the review incurred by the opposite party." Now, the tariff provides for the costs in cases of writs of possession, they are not at all assimilated to the costs in real actions. Writs of possession cannot be said properly to be actions at all. They are awarded in execution of judgments, and they are so looked upon apparently in the tariff; see numbers 40 and 41 of the tariff as published in Foran's C. of P. So that the tariff gives in this

case \$18, where, if the proceeding, instead of being considered an execution, had been considered a principal action, it would have given \$60. We are of opinion to reject the petitioner's motion with costs.

Brooks & Co. for petitioner.

F. O. Bélanger for respondent.

COURT OF REVIEW.

MONTREAL, February 28, 1881.

SICOTTE, PAPINEAU, JETTÉ, J. J.

CHAUSSÉ V. LAREAU.

Charges de la mitoyenneté—Loss suffered by the rebuilding of a mitoyen wall.

The action was instituted by the plaintiff for \$197, and was based on alleged loss and inconvenience suffered by the taking down and rebuilding of a *mitoyen* wall. It was proved at *enquête* that the proper precautions had been observed and no unnecessary delay or neglect had taken place. The action was dismissed in the court below, and the judgment was confirmed in review.

Vide: Toullier, vol. 3, No. 215; Pardessus, Servitudes, No. 166; Peck v. Harris, 6 L. C. J. p. 206. (Q. B.).

Ethier & Pelletier, for plaintiff.

Lareau & Lebeuf, for defendant.

CIRCUIT COURT.

MONTREAL, June 30, 1881.

Before RAINVILLE, J.

VICTORIA MUTUAL FIRE INSURANCE CO.

V. CARPENTER.

Security for costs—Foreign company—A foreign company which has a place of business in the province of Quebec, is not bound to give security for costs in an action instituted in this province.

The defendant moved for security for costs on the following grounds:

1. Because the plaintiffs have no office or place of business in the city of Montreal and province of Quebec.
2. Because the head office and chief place of business of the said plaintiffs is situated at Hamilton in the province of Ontario, and they have no office in Montreal.
3. Because the said company, plaintiffs, is

insolvent, and especially the branch which claims from defendant the sum of \$28.47 by the present action.

4. Because the said company plaintiffs has withdrawn its business, and especially the branch which claims to have taken defendant's risk, from the city of Montreal and province of Quebec.

An affidavit was filed showing that the company had an office in Montreal.

The Court rejected the motion, but without costs; on the ground that the company, though having its chief place of business in Ontario, had an office and place of business in the province of Quebec.

[See 21 L. C. J. 224; 1 Legal News, pp. 53 62 and 139.]

Walker & McKinnon for plaintiffs.

Greenshields & Busted for defendant.

RECENT DECISIONS AT QUEBEC.

Natural child—Paternity—Evidence.—Jugé (1) que, dans la recherche de la paternité par l'enfant naturel, la preuve testimoniale ne peut être admise que lorsqu'il y a commencement de preuve par écrit ou des présomptions ou indices résultant de faits, constatés avant l'enquête, assez graves pour en déterminer l'admission.

(2) Qu'une transquestion posée par le prétendu père à un des témoins de l'enfant, ne peut pas être un commencement de preuve par écrit ni une présomption qui puisse autoriser la preuve testimoniale, et que les faits que l'enquête constate, quelque graves qu'ils soient, ne sont pas suffisants pour la justifier, la loi exigeant une constatation antérieure.—*Turcotte es-qual. v. Natché*, (Court of Review,) 7 Q. L. R. 196.

Inventory—Community.—The inventory of a succession is not null for want of having been judicially closed, nor by reason of errors or omissions, when there is no fraud nor dishonesty of any kind.—*Gingras v. Gingras et al.*, (Superior Court, opinion of Meredith, C. J.), 7 Q. L. R. 204.

Action en bornage—Costs.—Jugé, que tous les dépens de l'instance, rendus nécessaires par les prétentions de l'une des parties, doivent être mis exclusivement à sa charge, quoiqu'elle ne soit pas autrement refusée au bornage, et qu'elle n'ait pas plaidé à l'action; et que les frais d'expertise et de bornage sont les seuls qui doivent être également partagés.—*Roy v. Gagnon* (Court of Review, Stuart, J. diss.), 7 Q. L. R. 207.

Judgment by default—Requête civile.—A defendant retained an attorney to defend his case upon the merits; the attorney so retained prepared an appearance which he believed he had filed, but owing to an omission in some quarter, the proper register did not show that an appearance was ever received at the office of the Prothonotary, and judgment was rendered by default. Held, that, in such case, a petition in revocation of judgment would be allowed, the judgment complained of not being susceptible of appeal. The list of cases mentioned in Art. 505 C. C. P. as giving rise to the *requête civile*, is not exclusive.—*Neil et al. v. Champoux et al.* (Court of Review, Meredith, C. J., Stuart, Caron, JJ.), 7 Q. L. R. 210.

Petitory action—Special replication.—Jugé : (1) Que dans une action pétitoire revendiquant la partie qui lui est échue dans la succession de son père, d'une propriété qu'a appartenu à la communauté entre son père et sa mère, la demanderesse n'est pas obligée d'alléguer sa renonciation à la succession de sa mère qui a vendu toute la propriété du défendeur, et qu'elle peut opposer ce moyen par réponse spéciale.

(2) Qu'une réplique spéciale à une réponse spéciale ne peut être produite sans la permission du tribunal; mais que, s'il est démontré, sur la motion pour la rejeter, que la réplique spéciale est nécessaire pour développer les moyens des parties, le tribunal peut permettre qu'elle reste au dossier, à la condition que celui qui l'a produite paie les frais de la demande de son rejet.—*Guay v. Caron* (Superior Court), 7 Q. L. R. 217.

Séparation de corps et de biens—Community—Adultery.—An adulteress loses all the advantages granted to her by her husband: but not her part of the community, which is regarded, not as a gift from her husband, but as representing what she contributed to, or earned, or saved for the community.—*L'Heureux v. Boivin*, (Superior Court), 7 Q. L. R. 220.

Lease—Sale.—Jugé : (1) Que sous l'acte de faillite de 1875, un juge a le droit de prononcer la résiliation d'un acte.

(2) Qu'un acte contenant un bail et une promesse de vendre acceptée, mais aucune promesse d'acheter, ne transfère pas la propriété, même s'il est accompagné ou suivi de la prise de possession.—*Levis et Bouchard v. Connolly*, (Superior Court), 7 Q. L. R. 224.

The Legal News.

VOL. IV. NOVEMBER 5, 1881. No. 45.

INSANITY AS A DEFENCE.

The law periodicals of our neighbors on this continent continue to be largely occupied, as is natural, with discussions on the subject of insanity, in its bearings upon criminal acts. Many good people seem to imagine that because Guiteau did an unreasonable thing, in that he killed a worthy man, without the incentive of any immediate personal benefit to himself, such as might be reaped by a highway robber who shoots a person in order to steal his watch, he must be insane. That, of course, is not the doctrine of the law, and let us hope that it never will be. It is true that at the present time medical authority is not entirely consonant on the subject of insanity, but the difference between the higher lights on this question is not really so great as might be supposed. Let us hear what Dr. Hammond, who has devoted much study to the subject, has to say:—"An individual may be medically insane, and yet not a lunatic in a legal sense. His brain is diseased, either temporarily or permanently; his mind is not in all respects normal in its action, and yet he is responsible for his acts. Many of the insane are clearly irresponsible, and their punishment is demanded only by the imperative necessity which exists of securing the safety of society by preventing their committing criminal acts. This should be done in that way which experience shows is most conducive to the accomplishment of the end in view, even if it involves the taking of the life of the lunatic. But there are others, people with morbid impulses—with delusions as to their mission as reformers, messengers of God etc., with intense egotism and desire for notoriety, manifestly abnormal in character; with tendencies towards the performance of eccentric and unusual acts; with a total disregard for the restraints upon individual indulgence which a decent sense of the opinions of mankind requires, of excessively-developed passions, which lead them to the commission of various bestial crimes—but who nevertheless show little or no

want of intellectual power (indeed this is often above the average), who transact their every day routine work with regularity and precision, and who reason logically and clearly on the subject of their particular point of aberration. Such people are medically insane; their mental processes are radically different from those of mankind in general; there is some defect, inherent or acquired, in the organization of their nervous systems; and the medical expert who goes into court and testifies to the fact of their insanity is entirely justified, by the accumulated experience of those most competent to know, in so doing. They are insane from a medical standpoint, but they know right from wrong; they know legal acts from illegal ones; they are able at some time at least to control their propensities, and their delusions may be entirely without reference to the alleged criminal act they may have committed. *While a knowledge of right and wrong can never be properly regarded as a test of insanity, it is a test of responsibility: and by knowledge of right and wrong is not meant the moral knowledge that a particular act would be intrinsically right or wrong—in other words, a sin—but that it would be contrary to law.* In reality, however, the individual may not even have this knowledge; but he must have, in order to make him responsible, the mental capacity to have it."

The president of the Oneida community, to which Guiteau at one time belonged, has written a letter which chimes in with the foregoing. There really seems to be no evidence to show that Guiteau should be saved from the ordinary punishment meted out to murderers, unless his trial should bring out something yet unknown to the world. Of course the utmost latitude of defence should be accorded. Some people are so thoughtless that they would curtail the privileges of a criminal who has done something unusually atrocious. Surely, the world is old enough to have outgrown such folly. It has been wisely said that it would have been better that Guiteau should have been lynched by the mob than that he should be lynched by a Court of Justice. The greater the culprit, the more strictly must recognized rule and precedent be adhered to. The act of Mason, who shot at a helpless prisoner in his custody through the window of his cell, can excite nothing but disgust and contempt in persons of healthy mind.

NEW PUBLICATIONS.

THE PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS AT LAW, in the courts where the Common Law Practice is in vogue; with the amendments thereto necessary to incorporate the provisions of the Statutes of Maine; by Joseph W. Spaulding, of the Sagadahoc bar, reporter of the decisions of the Supreme Judicial Court of Maine. Portland: Dresser, McLellan & Co.

This is a work which, though not adapted to the use of the legal profession in the Province in which the majority of our readers reside, is one which we can commend to those who are in quest of a clear and careful exposition of common-law practice. Mr. Spaulding is no novice in the mysteries of procedure, and those who resort to his work will often meet with an unexpected deliverance from perplexity. The arrangement of the work is very good, and everything, apparently, has been cited which could serve to throw light upon the text, or be useful to the practitioner.

THE ODDITIES OF THE LAW, by Franklin Fiske Heard.—Boston: Soule & Bugbee.

The title of this work indicates its character. It is a collection of quaint and amusing sayings of or about legal and judicial personages, perhaps not all strictly authentic, but which may well serve for the diversion of leisure moments.

Some portions of the miscellany we may reproduce hereafter, as space permits. It is only fair to add that this little book is not defaced by the vulgarities which sometimes pass current under the head of legal anecdotes.

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, Oct. 31, 1881.

JOHNSON, RAINVILLE, JETTE, JJ.

[From S. C., Montreal.

HURTURISE v. RIENDEAU, and TESSIER, mis en cause.
Witness — Officer of Court — Review — Powers of Court of Review.

A bailiff of the Superior Court, who, by the judgment complained of, was suspended, in consequence of his testimony as a witness in the cause, is not a party to the cause in which he was examined, and the Court of Review will not, upon an inscription by him, inquire into the legality of the suspension.

Seemble, that the proper mode of seeking redress in such case is by petition to the Superior Court.

The judgment inscribed in Review was rendered by the Superior Court, Montreal, (Mackay, J.), June 27, 1881.

JOHNSON, J. There are two inscriptions in review of this case—1st, the defendant, who had been arrested under a writ of *capias*, petitioned for his discharge, and got it, and the plaintiff inscribes the judgment which liberated him. 2ndly, Louis Tessier, a witness in the case, who happened also to be a bailiff of this court, was found by the learned judge to have been tampered with, and to have sworn falsely; and he was then and there struck from the list.

There would thus appear to be two cases before us: the plaintiff's case, which he inscribes regularly, and which is met on the merits by the defendant, who supports the judgment, and in my opinion, supports it with reason on his side; and secondly, there would be the case of this witness, who assumes to inscribe the judgment in so far as it affects him; and his case would present two points—1st, has he a right to come into review? is he a party? and 2ndly, if he has the right, has he been properly dismissed? In *Ex parte Chartrand*, petitioner, and *Lambert*, respondent, (reported in 3rd volume of Legal News, p. 77), we decided that a bailiff regularly dismissed on petition, and after answer and hearing, had no right to review; and though it was not expressed, I believe we all felt in that case that his recourse would have been to the appointing power, the Superior Court (not to three Judges sitting here in Review) to get himself reinstated. He may or may not have been properly dismissed. He might or might not have had a right to be put under a rule to answer. We say nothing about that now; but the fact of his being improperly dismissed, which we by no means assume, would certainly not give jurisdiction to the three judges sitting here in review. How a witness can call himself a party in the case merely because his evidence was animadverted upon by the Judge in giving judgment, with whatever consequences to himself, I cannot understand. Injustice, if any has been done, gives him a right to redress in the right quarter, but not in the wrong quarter. I do not think that an inscription in review by a witness in a case should be received or can be acted upon. The most outrageous consequences would ensue, if

unprincipled litigants could delay justice by causing all the witnesses to inscribe every judgment. I would therefore confirm the judgment as between the parties, with costs against the plaintiff inscribing, and I would reject the inscription which has been illegally made by a witness who is not a party to the case, and who, if he suffers hardship, should apply to the proper source for redress. As there is no party contesting this singular inscription made by the witness, there is no one to whom we can award costs.

RAINVILLE, J., concurred with Mr. Justice Johnson in holding that upon an inscription in Review, a witness could not complain of the part of the judgment which affected him.

JETTÉ, J., (*diss.*) differed from the majority only as to the part which concerned the bailiff. His Honor held, as a matter of principle, that disciplinary punishment could be inflicted upon an officer of the Court only for something done or some default committed by him in the discharge of his duty as such officer. Here the bailiff was a witness in the suit, and it appeared to his honor that he had been punished by suspension from the office of bailiff for his conduct in the witness box, and in consequence of the evidence which he had given. His Honor, while agreeing with the judgment of the Court on the merits of the case, was of opinion that the powers of the Court of Review were sufficiently comprehensive to strike out and obliterate—to *biffer*—from the judgment the illegal punishment inflicted upon the witness, Tessier, and he was therefore of opinion to reform the judgment in this respect.

Judgment confirmed, Jetté, J., dissenting.

Z. Renaud for defendant, petitioner.

Dejardins & Co. for plaintiff contesting.

COURT OF REVIEW.

MONTREAL, Oct. 31, 1881.

JOHNSON, TORRANCE, RAINVILLE, JJ.

[From S. C., Ottawa.

BIRABIN dit St. DENIS v. LOMBARD.

Pleading—Demurrer—Quality of defendant.

In an action against a curé for refusing to receive a vote at a meeting of the Fabrique, it is not ground of demurrer that the writ was addressed to the curé in his personal and not in his official quality.

The judgment inscribed in Review was rendered by the Superior Court, district of Ottawa, (McDougall, J.) February 17, 1881.

JOHNSON, J. This was a writ of mandamus, accompanied by a *requête libellée*, and the complaint was that the curé of Ste. Angélique, of which the plaintiff was a parishioner, had rejected the vote of one Pierre Chabot, tendered in support of a motion in amendment then before the chair, at a meeting of the Fabrique.

The writ was addressed to the "Révérend Messire François Lombard, Prêtre et curé de la dite paroisse de Ste. Angélique, diocèse d'Ottawa, dans le dit district." Then, the *requête libellée* set out fully that the curé, as such, was *ex officio* by law chairman of the meeting, and had rejected the vote in that capacity. There was an *exception à la forme* on another point—and it appears to have been withdrawn; but there was no *exception à la forme* to the writ as containing a *défaut de qualité* in the designation of the defendant.

The action, however, was dismissed on a plea of *défense en droit* to the *demande* or *requête*; and it was dismissed on the ground, not that it contained insufficient allegations, nor on any ground relating to the contents of the *requête* itself, but upon the ground that the writ was addressed to the defendant in his personal, and not in his official quality. Now, in the first place, this was not a ground of a *défense en droit* at all. That plea could only raise the question whether good cause of action was alleged on the face of the petition or not. In the second place, if that were the question raised here, (and no other can be raised by a *défense en droit*), we are all of opinion that the allegations were sufficient. The defendant, it is true, is addressed as curé in the writ; that is not objected to, but in the *demande* or *requête*, it is plainly and fully alleged that he was, in virtue of his office of curé, bound by law to preside at that meeting; and that he did preside at it. Then it was said that the allegations did not show that the vote was refused; because there was no vote actually given, and therefore none could be refused. This is a mere subtlety. No vote was given because (according to the allegations) none was allowed to be given. We unanimously reverse this judgment and dismiss the *défense en droit*.

I should add, perhaps, that though the sole ground of the judgment is expressed to

be that the writ was addressed to the defendant in his personal capacity, it was further objected here in review that the petitioner merely alleged himself to be a parishioner at the time of bringing his action, without showing that he had been a parishioner at the time of the meeting. It can be plainly collected from the allegations, however, not only that he called himself a *paroissien* at the time of his petition (which is all perhaps that he does in the first part of it), but also that he subsequently alleged his right to petition in this case by the words, "*Qu'il est qualifié et bien fondé comme paroissien de se plaindre.*" Besides, even the first part of the petition says he is a parishioner of that parish, and resides there, and resided there before the meeting; and had a farm there, and in fact had all the qualifications of a parishioner at the time of the meeting, though he does not actually aver that he was such parishioner on that day, and at that hour. So we hold the allegations of the petition perfectly sufficient, and we reverse the judgment.

C. B. Major for plaintiff.

A. Rochon for defendant.

Mercier, Q. C., counsel for defendant.

COURT OF REVIEW.

MONTREAL, October 31, 1881.

JOHNSON, MACKAY, RAINVILLE, JJ.

[From C. C., St. Hyacinthe.

THE CANADIAN COPPER AND SULPHUR COMPANY
v. MARION et al.

*Cord of Firewood—Measurement—Standard Foot
in absence of agreement.*

*The English foot, by the Weights and Measures Act,
is the standard for measuring the cord in
the absence of any agreement.*

*In this case no agreement to the contrary was
proved.*

The defendant inscribed in Review from a judgment of the Circuit Court, St. Hyacinthe, Sicotte, J., March 31, 1881.

JOHNSON, J. The plaintiffs here sued the defendants to recover from them a balance alleged to be due on the price of 1,000 cords of wood sold to one of them (Marion), the two others (Gray and St. Amour) being his sureties. The wood was sold at so much per cord, and the issue is substantially what is the number of cords delivered,—the plaintiffs alleging the

delivery of the whole number of cords sold, and the defendants insisting that the sum of \$1,285 35 (which they are credited with) more than pays for the number of cords that have been delivered.

To decide this question we must know what is a cord of wood. Now, it may be said, perhaps, that the parties as well as the Court perfectly understand what is a cord of wood—that it is a matter of common knowledge in Lower Canada, and one with which the court would probably be expected to be acquainted; but that is not the case. It is true that the cord has been commonly understood to be eight feet long and four feet high—the length of the wood varying. In olden times in Lower Canada the French foot, which is somewhat longer than the English, was used, but not exclusively, to measure cords of firewood. We are not called upon, however, here, to say whether the cord now is, or whether it ever was, an invariable measure. The contest between the parties is not what is the cubic measure in feet of a cord of fire wood, but what is the standard foot. Is it the English or the French foot? and they both agree upon two points, viz., 1st, that by the Weights and Measures Act, the English foot is the standard, and in the absence of contrary agreement, is to prevail; and 2ndly, that if the English foot is used in this instance, the whole number of cords sold have been delivered.

The contest is thus reduced to a question of fact, viz.: Whether by the contract as proved, the cord was to be measured by the French foot. I say this is the only contest in reality between the parties; because the case was so expressly presented at the hearing. I do not say that is the true issue by the record, for the plea does not allege a contract by the French foot, as it should have done. It only alleges that 779 cords are all that has been delivered; and that they have been paid for by the sum credited, the difference of 71 cords being caused by the fact that the seller used the English measure, and the purchaser the French. The contract was in writing. There is no pretence of fraud or anything of that sort; and the verbal evidence as to the kind of measure to be used is all thrown away. The 12th section of the Weights and Measures Act (36 Vict. c. 47) enacts that after the coming into force of the Act, "all contracts, bargains, sales or dealings

made or had in any part of Canada for work to be done, or goods, wares, or merchandise, or other things to be sold, delivered, or agreed for by weight or measure, where no special agreement is made to the contrary, shall be deemed and taken to be made and had according to the standard weights and measures fixed and defined by this Act." It results from the first and second sections of the statute that the standard foot is the English foot. The French foot is, by the first sub-section of the 13th section, declared to contain seventy-nine hundredths of an inch more than the English foot. If it was intended to contract by the French measure, it should have been so stipulated. The judgment below was conformable to this view, and we confirm it.

There was a point mooted as to the form of the condemnation, which has merely the effect of a joint condemnation against all the defendants, which was all that was asked by the conclusions of the declaration. The defendants are not aggrieved by this. It is less than might have been asked, and the plaintiffs do not complain of it.

Judgment confirmed with costs.

Fontaine & Co., and Hall & Co., for plaintiff.

Mercier & Co., for defendant.

SUPERIOR COURT.

MONTREAL, Oct. 31, 1881.

Before JOHNSON, J.

GOULET v. STAFFORD.

Damages—Negligence—C. C. 1054.

A shutter from an upper story slipped off its hinge while defendant's servant was opening it. Held, that although there was no gross negligence on the part of the servant, yet her employer was responsible for injuries sustained by the plaintiff, in consequence of the shutter falling upon her.

JOHNSON, J. The plaintiff was walking in the public street, and a shutter from an upper story of a house in the occupation of the defendant fell upon her, breaking the right clavicle, and she was rendered unable to work for some time. She now sues for damages; and the defendant pleads that he was not guilty of any carelessness or negligence, and that, if the plaintiff has suffered any damage, it did not arise from any act of his, or of those for whom he is responsible.

Articles 1053 and 1054 C. C. settle the law; Art. 1053: "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill." 1054: "He is responsible, not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control, and by things which he has under his care."

The fact is that the shutter slipped off the hinge when the servant girl of the defendant was opening or shutting it. There was no gross fault on her part. She was handling a very dangerous and stupid contrivance, which, I see by the papers, has caused frequent so-called accidents. The defendant, under article 1054, is clearly responsible for her acts, or rather for the consequences of them. The only thing said for the defence was that there was no "fault" on the part of the defendant or his servant, and that it was inevitable accident. "Fault" is the word used in the law. It means, says Guyot, Rep., vol. 7, page 296, an act done by ignorance, unskillfulness or negligence. The *onus probandi* is on the party charged to show there was no negligence. (*Holmes v. McNeven*, 5 L. C. J. 271.) Of course, there was no inevitable necessity for the defendant to use shutters. If he does so, he must see that they are hung so as to be used with safety to others.

The only question is as to the amount of damages under the circumstances. The plaintiff has proved conclusively that for five weeks her arm was tied up, and useless; and is even now of impaired strength. Her sufferings were considerable from privation of sleep caused by the pain. She had been earning a dollar and a half a day; and it is also proved that her trade is that of an ironer at a shirt maker's, and the injury was to the right shoulder which will in future always be lower than the other.

There is no doubt a right to considerable damages; and it is no answer nor part answer to her claim that she has received something from a benefit society to which she, and her fellow operatives contributed. She has only by her own providence and that of others got back in part what she and they have contributed; and the defendant has nothing to do with that at all. But in settling the damages, I come to a techni-

cal difficulty which is vexatious in such a case. The fact occurred on the 1st of July, 1881. Without waiting to see the extent of damage she might suffer, the action was brought on the 8th of the same month, and asks not only for the damage then already accrued; but for that which was to come; and the case was treated by both the parties, at the argument, without reference to this at all; and as if all the damages were due seven days after the fact—when the action was brought. If I were to give final judgment now, I should only expose the parties to further useless and expensive litigation; I therefore discharge the case from the rôle, with a view of having an incidental demand (which is inexpensive) put in. Art. 149 C. P. allows this, either where the plaintiff has omitted anything, or has acquired any right since the bringing of the action.

Duhamel & Co., for plaintiff.

J. J. Curran, for defendant.

SUPERIOR COURT.

MONTREAL, Oct. 31, 1881.

Before JOHNSON, J.

GEOFFRION V. THE CORPORATION OF BOUCHERVILLE.

Quasi contract.

JOHNSON, J. On the 2nd July, 1879, two persons of the name of Riendeau made a contract with Bruno Prevost, road inspector for the *Rang du Lac* and the *Rivière au Pins*, in the municipality of the parish of Boucherville, to do some repairs to a bridge called the Pont du Lac, and the price they were to be paid was \$470. The work was done, and the question now is, who is to pay for it? The plaintiff, to whom the Messrs. Riendeau have assigned their claim, contends that the contract was made with the inspector so as to bind the present defendants. The latter, however, plead that in May, 1822, Mr. Delery, then Grand Voyer, had this bridge reconstructed, and erected into a public bridge, and duly *procès verbalised*, and the *procès verbal* homologated at Quarter Sessions. Between 1822 and 1873 the bridge has been rebuilt or repaired four times, and the cost has been each time paid in accordance with the old *procès verbal*. On all these several occasions the local inspector acted without consulting the Grand Voyer while that office existed; and when it came to 1879 and further repairs were required, the

inspector Mr. Bruno Prevost, still followed the old practice, and without addressing himself to the local council, or getting their authority, adjudged the work to the Riendeaus as the lowest tenderers, and a number of those interested and assessed to pay the cost, duly paid the inspector, who had his right of action against all the others for their share. To have acted as he did, the inspector did not require the authority of the council, and that body never meddled with the matter at all, and never contracted with the Riendeaus, who neither themselves have any right of action against the defendants, nor could assign any such right to the plaintiff. This is in substance what is contended for by the defendants. The action, however, is only for a balance of the \$470, which was the whole cost of the work; the declaration alleging that the defendants had paid in part through their secretary-treasurer. This is specially denied by the plea, and it is averred on the contrary, that Mr. Normandin paid, not as a secretary-treasurer of the corporation, but simply being a notary of the place—as agent for the inspector, on whose behalf he had received certain payments made by some of the *contribuables*.

The plaintiff's counsel rested his case, at the argument, on two grounds: 1st. He said there was a direct contract with the corporation, defendant; and 2ndly, he contended that if the bargain with the inspector of the 2nd July, 1879, did not amount to a direct contract with the corporation, the latter have at all events assumed and profited by the work, and should pay for it on the ground of a *quasi* contract having been operated by law. On the first point I am clear that the plaintiff has no case; there is no authority shown from the corporation; and it is quite plainly in evidence, from the course of proceeding taken by the inspector, that he himself felt and considered he was acting under the old *procès verbal*, and that it was not a contract on behalf of the Corporation at all. On the 2nd point, I am also against the plaintiff. The case of *De Bellefeuille v. The Municipality of the Village of St. Louis* decided by this Court about a year ago, (4 L. N. 42,) was cited in favor of the view that in the present case there was a *quasi* contract. That case, it ought to be observed, was not decided on the ground of a *quasi* contract; I did not indeed say there was no *quasi* contract there, for I am strongly inclined to the view that there was one;

but the judgment rested on the specific ground that the defendants had taken, and had used what was got for them by the plaintiff's services. If I saw that such was the case here, I should, of course, hold this corporation liable also; but I see nothing of the sort. I see a work done not for their exclusive benefit, but for the more especial benefit of an *arrondissement* subjected by the old *procès verbal* to pay for it, and in which the parties who ought to contribute have actually paid on account, and to that extent have admitted their liability; I see that those payments so made by the *contribuables* under the old *procès verbal* are in bad faith alleged to be payments made by the corporation, because the notary Mr. Normandin, who received them on behalf of the inspector, happened also to hold office under the corporation as secretary-treasurer; and I see no corporate act of assumption of this work. Therefore, as there is neither contract, quasi-contract, nor assumption or ratification by the corporation, the plaintiff's action is dismissed with costs.

Choquet for plaintiff.

Loranger, Loranger & Beaudin for defendant.

SUPERIOR COURT.

MONTREAL, Oct. 31, 1881.

Before JOHNSON, J.

TREMBLAY v. JODOIN et al.

Account—Vouchers in possession of plaintiff.

JOHNSON, J. On the 24th of July, 1879, the plaintiff made an assignment of his property to the defendants, to whom he gave power to realize the price and pay it over to his creditors, some of whom, a few days later, ratified the assignment. He now brings his action, alleging that the defendants took possession and sold, and got a price exceeding \$3,000, which is much more than sufficient to pay the plaintiff's debts, but that they have not paid all the debts, and although often requested to give an account, refuse to do so, and have in their hands over a thousand dollars belonging to the plaintiff. The conclusion is for a condemnation to render an account within a fixed delay, and default to pay \$1,000, interest and costs.

The defendants, by their plea, admit their obligation under the deed of assignment, and allege that they have sold the property, and realised \$2,861.99, out of which they have paid

creditors \$2,857.21, and have a balance in hand of \$77, which they have a right to keep until the execution of a proper discharge. That they have already rendered an account *à l'amiable* to the plaintiff, and have given up to him all the vouchers, which he keeps and refuses to restore.

The evidence is that the plaintiff and his wife went to see Jodoin, one of the defendants, and got this account. There is a copy of it produced by the defendants, and it is not final. The parties appear quarrelsome and litigious, and the fight is as to whether this account was ever accepted; because if it was, there is good reason and good authority for saying that the plaintiff would not have an action *en reddition*: i. e., to render what had been already rendered, especially if he kept the papers and vouchers, as it would be manifestly unreasonable to ask for an exact account from memory. I do not find, however, from the evidence either that the account has been accepted as final, or that the plaintiff absolutely refuses to give them up; but he has got them, and he must give them up before the defendants can be obliged to account to him. Therefore the judgment is that the account is to be rendered in due form within three weeks of the production and filing by plaintiff (of which notice is to be given to the defendants) of all the papers and vouchers which he got from Jodoin and now has in his possession. Costs reserved.

Préfontaine & Co. for plaintiff.

Pelletier & Jodoin for defendants.

RECENT U. S. DECISIONS.

Libel—In a newspaper article.—In a declaration for publishing a libellous article in a newspaper, it is not necessary to aver that the publication was made to divers persons or to any third person; it is enough to aver that the libel was printed and published in a newspaper. To publish is to make public. A publisher is one who makes a thing publicly known. Had the allegation been merely that the defendant "printed" a libel, that would not have been enough. But to aver that a defendant "published" a libel does declare that he circulated it or caused it to be circulated "among divers and sundry persons." The degree of notoriety given to the publication is matter of proof and

not of pleading. *Commonwealth v. Blanding*, 3 Pick. 304; *Commonwealth v. Varney*, 10 Cush. 402; *State v. Barnes*, 32 Me. 530; *Rex v. Burdett*, 4 Barn. & Ald. 95; *Bailey v. Myrick*, 50 Me. 171. *Sprout v. Pillsbury*, 72 Me

Municipal corporation—Liability for personal injury in city building let for profit.—A city let its city hall, a building erected for municipal purposes, for profit, to an exhibition society. With it the services of the janitor, to light and care for the building, were let. While the building was so let, plaintiff, who was rightfully therein and using due care, was injured by falling through a trap-door negligently left open by the janitor. *Held*, that the city was liable for such injury. A city or town is not liable to a private citizen for an injury caused by any defect or want of repair in a city or town hall or other public building erected and used solely for municipal purposes, or for negligence of its agents in the management of such buildings. But when a city or town does not devote such building exclusively to municipal uses, but lets it or a part of it for its own advantage or emolument, by receiving rents or otherwise, it is liable while it is so let, in the same manner as a private owner would be. *Oliver v. Worcester*, 102 Mass. 344. The defence of *ultra vires* in the letting held not available as a defence in the case. *French v. Whitney*, 3 Allen, 9. *Worden v. City of New Bedford*. Supreme Judicial Court, Mass., April, 1881. 24 A. L. J. 355.

GENERAL NOTES.

Lord Ellenborough showing some impatience at a barrister's speech, the gentleman paused and said: "Is it the pleasure of the court that I should proceed with my statement." "Pleasure, sir, has been out of the question for a long time; but you may proceed."

When sitting in the Rolls Court, indignant at the conduct of one of the parties, Lord Kenyon astonished his staid and prosaic audience by exclaiming, "This is the last hair in the tail of procrastination!" Whether he plucked it out or not, observes Mr. Townsend, the reporter has omitted to inform us.

When Plunket was driven to resign the Irish Chancellorship, he was succeeded by Lord Campbell. The day of the latter's arrival was very stormy, and a friend remarked to Plunket how sick of his promotion the passage must have made the new-comer. "Yes," he replied ruefully, "but it won't make him throw up the seals."

Henry Hunt, the famous demagogue, having been brought up to receive sentence upon a conviction for

holding a seditious meeting, began his address in mitigation of punishment by complaining of certain persons who had accused him of "stirring up the people by dangerous eloquence." Lord Ellenborough C. J. (in a very mild tone): "My impartiality as a judge calls upon me to say, sir, that, in accusing you of that, they do you great injustice."

In the case of the *King v. The Warden of the Fleet*, 12 Mod. 340, it was objected to a witness that he had been convicted of common barratry; and a record of his conviction was produced, which showed that he had been fined one hundred pounds. Holt, C.J., said: "If he had had the handling of him, he had not escaped the pillory, and that he remembered Sergeant Maynard used to say it were better for the country to be rid of one barrator than of twenty highwaymen."

"*Nihil habet forum ex scenâ*" is one of Bacon's maxims; but he there refers to fictitious cases brought into the courts in order to determine points of law. Sergeant Maynard, who died in the reign of William III., is said to have had "the ruling passion strong in death" to such a degree that he left a will purposely worded so as to cause litigation, in order that sundry questions which had been "moot points" in his lifetime might be settled for the benefit of posterity.

Here is an instance of Lord Lyndhurst's good nature. When Cleave, the news-vender, was tried in the Court of Exchequer on a government information, he conducted his own case, and was treated with much indulgence by Lord Lyndhurst, the judge. Cleave began his defence by observing that he was afraid he should, before he sat down, give some rather awkward illustrations of the truth of the adage that "he who acts as his own counsel has a fool for his client." "Ah, Mr. Cleave," said his lordship, with great pleasantry, "ah, Mr. Cleave, don't you mind that adage: it was framed by the lawyers."—From "*Oddities of the Law*," by F. F. Heard.

HUISSIER EN MER.—Le Testamaniau avait pris sa cargaison et se préparait à quitter le port, quand arriva un huissier qui saisit le navire. C'était la loi: mieux valait se taire et obéir; c'est ce que le capitaine comprit. On nomma un gardien, et c'est sur lui que le marin, irrité du fâcheux contretemps qu'il subissait, assouvait sa colère. Dimanche matin, il monta sur son navire, sans adresser une parole, assaillit le gardien qu'il chassa du vaisseau. Il donna ensuite des ordres à son équipage, les ancres furent levées, et quelques minutes plus tard le navire prenait sa course vers le bas du fleuve. Les inquiétudes du capitaine se dissipaient peu à peu à mesure que le vaisseau s'éloignait du port; il commençait à croire à la liberté, peut-être même à rire du moyen audacieux qu'il venait d'employer pour échapper à la justice, lorsque soudain il aperçut un vapeur qui courait dans la direction de son navire. Le coupable ne reposa jamais tranquille, et à l'approche de ce vapeur, le marin présuma qu'on le poursuivait; ses prévisions étaient justes. On n'était pas rendu à l'île aux Pommes qu'un signal d'arrêt fut donné au capitaine du navire, et presque aussitôt le vapeur s'en approcha. Alors, un huissier, M. Richard, fils, signifia au capitaine l'ordre de rebrousse chemin. Celui-ci fut obligé de se soumettre à cet ordre et hier soir il occupait l'endroit qu'il avait quitté si affrontément la veille. La cargaison de bois est évaluée à \$25,000. La cause de tout ce trouble est une misérable somme de \$15 que le capitaine refuse de payer. —*L'Événement*.

The Legal News.

VOL. IV. NOVEMBER 12, 1881. No. 46.

RULES OF PROFESSIONAL CONDUCT.

"Young Advocate" writes as follows:—

"To the Editor of the LEGAL NEWS.

"DEAR SIR,—I wish to obtain standard information as to two points of professional conduct. In the first place, when should a lawyer refuse a case? Secondly, when is he justified in asking for one? I have heard many contradictory opinions on both heads, and, though for this reason compelled to frame rules for myself independently, I should like to correct them in accordance with received usage. With regard to refusing cases I have concluded that the machinery of law exists for the sole purpose of healing disputes, of harmonizing society and of furthering justice, and to these ends that a lawyer should refuse any claim which is manifestly unfounded or criminal, but that if his client may reasonably hold his claim correct, though from merely personal grounds the lawyer considers it not so, the latter is bound to present, with all his resources and legal machinery, the client's view. As to asking for cases I have made three temporary rules where I think there is justification: the case of a close personal friend under exceptional circumstances; that of a creditor to whom one owes a large debt; and that of an important corporation. Please criticize and oblige."

Opinion has differed somewhat on the first point, but there can be little practical difficulty in determining the course which should be followed. A lawyer is not justified in refusing to defend an accused person merely because he thinks or knows him to be guilty; but he should not, under such circumstances, even in the most indirect way, express to the jury his belief in the innocence of his client. In the civil courts, a lawyer should refuse to give his advice or to act as counsel in a case which he sees is intended to blackmail, or to harass, or wrong the defendant. The exercise of his profession, or the profit he may derive from it, or even his client's interest, is no excuse for committing an immoral act.

The second question of our correspondent, when is a lawyer justified in asking for a case, may be answered in one word: Never! The supposed exceptions we cannot admit. If a "close personal friend" does not think highly enough of "young advocate" to intrust him voluntarily with his business, the friend may be placed in a very embarrassing position by a personal appeal. Still worse is the solicitation of a creditor for business. This would justify "young advocates" in importuning their tailor or bootmaker, who often may be their largest creditor. With reference to companies, we have always thought that the canvassing of such bodies, or rather their directors, for the patronage at their disposal, is a departure to be regretted from the traditions of the profession of advocacy.

ADVOCATE AND ASSIGNEE.

To the Editor of the LEGAL NEWS:

SIR,—I have been requested to enquire through the LEGAL NEWS if it is in conformity with the rules and discipline of the bar that one should carry on the two-fold and I dare say, very profitable business of assignee to insolvent estates and advocate at the same time, a conspicuous example of which will be seen by the enclosed copy of advertisement.

The convenience of combining the two, from a business point of view cannot be doubted, but its fairness is very questionable.

Yours truly,

ADVOCATE.

[Our correspondent is hypercritical. The office of assignee is virtually extinct, nearly two years having elapsed since the abrogation of the Insolvent Act. It would be hard to debar a gentleman from the practice of his profession merely because he continues to represent a few estates which have not been completely wound up.—Ed. LEGAL NEWS.]

CIVIL PROCEDURE IN QUEBEC.

To the Editor of THE LEGAL NEWS:

SIR,—The Province of Quebec being in labor of some improvements in its legal procedure, it behoves the profession to give a helping hand in such a difficult and important task. Ex-Judge Loranger having been entrusted with the work of overhauling the existing system,

he will, we are sure, be grateful for any useful suggestion. We may avail ourselves of the efforts presently made by the English judges to improve the whole system of British procedure, including barristers' process *coram judge*, conveyancing, solicitor and attorneys' agency, in fact the whole machinery of the law and its ramifications. Our Legislature did not aim at such a vast object, and we are not sorry for it. The practice of the different branches of the law is here so distinct, as regards lawyers and notaries, that one class of practitioners would not think of interfering with the other. But, limited as is the work devolving on Judge Loranger, it is still too much for a man to perform. It was very wise to set one man at work to prepare a canvass for a body of specialists to consider; but Judge Loranger cannot be expected to do more. In England the whole Bench has been called upon to perform the duty of amending and consolidating the laws of procedure; and the draft of their work was published *in extenso* by the *Times*, in October last. On account of the vast difference which exists between the procedure before the English Courts and the Courts of our Province, there may perhaps be little profit to be derived from the study of the new rules of procedure prepared for the British Courts, though we are confident that greater simplicity might be reached by a full comprehensiveness of the subject in different countries; but we refer to the work now being done in England to show how important it is found, in a country so well trained as England is, in every department of public life, to entrust such a work to a large and best informed body of men. We would, therefore, suggest that during the next session all the judges be constituted a regular Board to take into consideration the suggestions of Judge Loranger, and reduce them and their own views into form for legislative enactments. The judges should be induced, by liberal remuneration, to undertake these functions during the next summer vacation.

In order to show to what results the study of comparative jurisprudence may lead, we have seen lately that it is suggested in England to limit the jury trials to the very cases where they are admitted in our Province, such as defamation, seduction, false imprisonment, malicious prosecutions, breaches of promise of

marriage, &c., although some minds of antiquated pattern look upon this innovation as the death knell of jury trial.

What we want here is more flexibility in the doings of our Courts. In questions engrossing public interest and involving difficult legal problems, our judges, both in the original and appellate jurisdictions, should have the power of bringing together a large number of judges to sit together, as they do in England. Subjects of trifling import are, by our Code of Civil Procedure, required to be brought only before the Court *in banco*, when it would suit all parties to go before a Judge in Chambers. In this respect, the old system of *Enquête* has not lost its prestige, on account of its pliancy. Many resort to it as an escape from the unavoidable inconvenience of waiting for trial, with numbers of witnesses, sometimes from a distance. As long as speedy justice cannot be administered, it will remain as a remedy for dispatching business.

The system of short-hand writing is distrusted by prudent and careful lawyers, and will be so as long as there are not official phonographers. The present system is objected to on the following grounds: (1.) There is no other responsibility but an object of lucre on the part of stenographers. They do their duty as long as it suits them. One case is interfered with by another case. They may leave the country with the evidence in their pocket, or keep it any length of time. (2.) One party is at the mercy of the other, inasmuch as a case may be kept from the deliberations of the judge so long as the evidence on both sides is not put in by the stenographers, sometimes by neglect, other times for fear of not being paid, and in some cases through corrupt motives, which, however, has seldom been the case. (3.) The cost of that mode of evidence is unbearably extravagant, from intrinsic and radical cause; and the length of the evidence is distressing to judges and lawyers. The writers are paid 20 cents per 100 words. The lawyers take them, as they press themselves to do the work, most of the time without knowing their aptitude, their name or their place of abode. When the evidence is wanted, the writer cannot be found, in many instances. When the depositions of witnesses are brought in, judges and lawyers have to read impossible hiero-

glyphics, which, when deciphered, are neither English nor French; and, what is worse, they find sometimes nothing of what the witnesses said; and some cases are known to have been lost, in appeal, for want of evidence which had in fact been adduced. The system of paying so much for 100 words is destroying the whole value of that mode of evidence. The profession has to deal with writers who have no other object than making the most of their profession, *at so much per 100 words*. Even if the writers should know how to take down the substance of the facts, their interest leads them to put in all the idle conversation and trash going on between a lawyer and a witness. The judge has to read three or four pages to find out *one* fact, and he is worried to desperation when a bushel of paper is brought to him, and he has a needle to find in it. When the case goes to appeal, the whole of that imponderable and volatile matter has to be printed at full costs, and the judges of appeal have to be worried, in their turn, with that airy kind of evidence; and if the case reach the Supreme Court or the Privy Council, in England, the legion of empty words has to be printed over again, carrying all through the same weariness and infliction upon the judges and lawyers, with renewed expense for the parties.

Unless the Government appoint official writers, who will have no interest in crowding records with a useless mass of paper, the system must be given up altogether. In the meantime there is a remedy. The judge might take notes of evidence himself, and this should be done until official short-hand writers are appointed.

This is our quota of suggestions for the present time.

D.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, Sept. 20, 1881.

DORION, C. J., MONK, RAMSAY, CROSS, BABY, JJ.
EDMOND LARREAU et al. (plffs below), Appellants,
and LA SOCIÉTÉ PERMANENTE DE CONSTRUCTION JACQUES CARTIER (defdt. below), Respondent.

Building Society—Purchase of real estate—Ultra vires transactions—Sec. 10 of Cap. 69 C.S.L.C.

The present appeal was from a judgment of the Superior Court, Montreal, (Torrance, J.) April 30, 1880, dismissing plaintiffs' action.

The judgment of the court below was as follows:—

"The Court, etc....

"Considering that by the terms of the Consolidated Statutes of Lower Canada, chap. 69, s. 10, the defendants were empowered to accept the real estate described in the deed of sale and lease of date 29 January 1874, as a security for the sum of \$2200, to be repaid as set forth in the deed of lease; seeing therefore that the action of plaintiffs is not founded in law;

"Doth reject said motion and plaintiffs' action and demand, with costs distracts to Messrs. Loranger & Co., attorneys for defendants."

The defendants are a body corporate and politic as a building society for raising by monthly and periodical subscription a stock or fund, to enable each member to receive the value of his share therein for the purpose of erecting or purchasing one or more dwelling houses. The society has no power to purchase real property for its own benefit, but may take and hold real estate mortgaged for payment of debts due to the corporation. On the 29th January 1874, by deed of sale, before Frechette, N. P. the *Société de Construction Jacques Cartier* bought from S. & A. Legault for the sum of \$2200, a property situated in the City of Montreal. It was purely and simply a deed of sale, "*les vendeurs reconnaissant avoir reçu présentement le prix de vente.*" On the same day the Society leased the same property to S. & A. Legault for twelve years, for the price of \$4356.80, payable in 154 instalments. A promise of sale is also contained in the lease after payment of instalments. In October 1874, S. & A. Legault, transferred and made over to the plaintiffs all their rights and obligations in the deed of lease. It was now claimed by the presentation that the sale by Legault to La Société de Construction Jacques Cartier was null and void, said contract being *ultra vires*, not binding on the part of the parties, the society, by the statute, having no power at all to purchase real estate. On the other hand it was contended that defendants were empowered to accept the real estate described in the deed of sale of date 29th January 1874, as a security for

the sum of \$2200 to be repaid as set forth in the deed of lease. Plaintiff held that the deed of sale was an absolute nullity.

Lareau, for plaintiffs :—

“ Le chapitre 69 des S. R. B. C. est un statut général qui permet à certaines corporations de se former pour des fins spéciales. Ces corporations ne peuvent avoir des pouvoirs plus considérables que ceux qui découlent de l'acte général à l'abri duquel elles vivent. C'est un principe admis et sanctionné par de nombreux jugements, tant en Angleterre qu'aux Etats-Unis, que les corporations ne peuvent faire que ce que la loi leur permet, au lieu que les individus peuvent faire tout ce que la loi ne leur défend pas. Une corporation ne peut donc faire aucune transaction qui ne découle pas de son acte d'incorporation ou qui s'éloigne du but de sa création. [*Vide* Brice, *ultra vires*, p p. 64, 107, 178, 186, 188. L. Rep. 7 H. L. 653; *Payne v. Mayor of Brocon*, 3 H. L. 579.]

“ La décision la plus récente et la plus remarquable sur cette matière a été rendue en Angleterre dans la cause de *Riché v. Ashbury Ry. Carriage, etc. Co*; L. Rep. H. L. Vol. 7, 653, rapportée au long dans Brice à la page 184 et suivante.

“ La cour est donc en présence d'un acte de vente pur et simple; c'est un acte *ultra vires*. La propriété vendue à la société continue d'appartenir aux Legault. La défenderesse ne pourra pas valablement donner un titre de propriété à l'expiration du bail des 12 années. Mais la défenderesse répond : “ Cet acte de “ vente a été fait en garantie d'un prêt ou “ avance d'argent de \$2,200 conformément à la “ s. 10 du chap. 69 des S. R. B. C.” et au soutien de cette prétention elle produit une application pour emprunt faite par les Legault. Cet écrit est sous seing-privé. Est-ce là un commencement de preuve par écrit ?

“ Pour qu'il y ait commencement de preuve par écrit trois conditions sont nécessaires, dit Demolombe, [vol 30, p. 129.]

“ Il faut :

1o Qu'il y ait un écrit;

2o Que cet écrit émane de celui auquel il est opposé, ou de celui qu'il représente, ou par lequel il a été représenté;

3o Qu'il rende vraisemblable le fait allégué.

“ En vertu de ces règles, on doit donc écarter de suite du débat la résolution des directeurs

qui n'est l'œuvre ni des Legault, ni celui des demandeurs. C'est absolument et uniquement l'écrit de la défenderesse; et en conséquence cela ne peut en aucune manière constituer un commencement de preuve par écrit.

“ Peut-on en dire autant de l'application pour emprunt? Oui. Cet écrit ne porte pas la signature des Legault [ils ont fait leur marque]; ils n'ont pas rédigé le corps de l'écrit. Peut-on dire que c'est là “ l'œuvre personnelle de celui auquel on l'oppose.”

(*Vide* Dallos, *Jurisp. du Roy.* vol. 10, p. 131; Sirey, *Code Ann.*, sur l'art. 1347, Nos. 44 et 45; Marcadé, vol. 5, p. 136; Pothier, *Obl.*, No. 806; Larombière, art. 1347.)

“ Cette demande d'emprunt ne peut d'ailleurs être opposée aux demandeurs puisqu'ils ne sont pas les ayants-cause des Legault pour les fins de cet emprunt; ils occupent la position de tiers; et cet écrit qu'on oppose comme commencement de preuve est, à l'égard des demandeurs, *res inter alios acta*.

“ Sur la distinction à faire entre les tiers et ayants-cause;— *vide* : Favard, *vo. ayant-cause*; *Id.* Rolland de Villargues; Laurent, vol. 19, No. 517; Troplong, *Priv. et Hyp.*, II, No. 530; Grenier, II, p. 132; Marcadé, vol. 5, p. 56.

“ La défense se trouve donc sans commencement de preuve par écrit; il ne peut donc lui être permis d'expliquer, dénaturer ou changer la portée de l'acte du 29 Janvier 1874. Cet acte est illégal, parce qu'en faisant cet achat, la Société défenderesse excédait ses pouvoirs. C'est le cas d'une nullité d'ordre public qui n'a pu être ratifiée, même par les parties intéressées. La propriété reste donc légalement entre les mains des Legault, et la Société défenderesse est incapable de donner aux demandeurs un titre valable de propriété ainsi que leur bail le promet. Elle doit donc être condamnée à ces fins, et rendre aux demandeurs leurs loyaux coûts.”

RAMSAY, J. This appeal is instituted by the plaintiffs. The action was to set aside a deed of lease ceded to appellants by Sebastien & Antoine Legault, 19th October, 1874, and the sums paid under this lease amounting to \$3,023.40. The respondents, as their corporate name indicates, are a Building Society, and they purchased on the 29th January, 1874, from the Legaults, certain immoveable property, situate in Montreal, for \$2,200. The same day they leased the property

for \$4,356.80 for twelve years to the vendors, the said sum being payable in 154 payments. It was this lease and their rights under it the Legaults transferred to appellants, who now pretend that the Building Society had no right to purchase this property; that the acquisition was *ultra vires*, and consequently that they are not owners of the property, but that the Legaults are owners, and that the payments to the building society are illegal, and that the appellants cannot safely continue to pay to the society. The appellants' pretensions seem to me to be totally untenable. Sec. 10 of cap. 69 C. S. L. C. appears to justify the Building Society in acquiring property *bona fide* for certain objects. The deed of sale does not show any *mala fides*, and the appellants say that there can be no evidence beyond the deed. If that position be true they are estopped from showing the *mala fides*. But the good faith of the whole transaction appears clearly from the two deeds of the 29th January to be within the powers of the Company. The object of building societies certainly is to enable the shareholders to erect dwellings for the shareholders or to purchase real estate. But it was evident that all the shareholders could not be borrowers to the full amount of their shares, and it is equally evident that the shareholders might not want to borrow at all. The society was therefore, perforce, a lending society, and this is especially authorized by sections 10 and 11, which contemplate loans to others than members. Then, as to the form of the deeds, that seems to be perfectly immaterial. Advances are to be secured by "mortgage or otherwise" (Section 1, ss. 2). The society may take and hold any real estate or securities thereon, *bona fide* mortgaged, assigned or hypothecated to the said society, either to secure the payment of the shares subscribed for by its members or to secure the payment of any loans or advances made by or debts due to such society, &c. (Section 10.) See also sections 11 and 13.

Taking this view of the case, it is hardly necessary to enter into an examination of the appellants' argument as to the evidence. The deeds not being unlawful on the face of them, it was for appellants to show that they were not in good faith—that they covered a nullity.

Judgment confirmed.

Robidoux, Lareau & Lebeuf, for appellants.

Loranger, Loranger & Beaudin, for respondents.

SUPERIOR COURT.

BEAUHARNOIS, Oct. 7, 1881.

Before BELANGER, J.

BOYD v. WILSON et al.

Moveables placed on real property—When immovable.

Moveable things in order to be considered immovable by destination, must have been placed on the real property by the proprietor, and for a permanency.

BELANGER, J. Il s'agit d'une saisie revendication des effets suivants: "one engine and boiler, one shaft with two pulleys and two collars, one shaft with one pulley and two flayes, one force pump, one cistern pump, one lot of gas pipes and valves, two milk vats, one curd sink, one cheese press with six screws, thirteen cheese hoops and followers, one whey can, one milk spout, one crane and grab hooks, one curd knife, two strains, two syphons, one filter, one scoop, one skimmer, twenty drying boards, one lot of gas pipes and valves."

Le demandeur repose son droit à la propriété de ses effets, 1o. Sur un bail pour neuf ans par John Cullen à Thomas Bryson, en date du seize Août, 1875, enregistré le dix-huit du même mois, d'un certain terrain y désigné, "with a cheese factory erected on the said piece of ground erected by and belonging to the said lessee, the said lessee being in possession of the same since the first of May last." A la fin de ce bail le locataire doit remettre le terrain dans l'état et condition qu'il se trouvait lorsqu'il en a pris possession, et de plus, "shall have the privilege to remove away from the leased premises all buildings erected on the same by the said lessee, his heirs and assigns during the present lease."

2o. Sur une vente à faculté de reméré par le même Bryson à Andrew Cook du trente Novembre, 1876, et enregistré le premier Décembre de la même année, par lequel acte Bryson vend et transporte à Cook, avec toutefois droit de rachat dans neuf mois à compter du dit acte de vente, le bail ci-dessus mentionné, "with a cheese factory built on said property, steam engine and other machinery belonging to the vendor Bryson, and sold with the said lease, with all and every the members and appurtenances thereto belonging."

30. Sur un acte de vente par Cook au demandeur en date du dix Janvier, 1878, et enregistré le sept Janvier, 1879, du même bail, "with a cheese factory built on said property, steam engine and other machinery belonging to the vendor and presently sold with his interest on said lease."

Les défendeurs de leur côté se prétendent propriétaires de ces mêmes effets saisis revendus sur eux en vertu—10. D'un acte de vente et transport avec droit de reméré par le même Bryson à David Strachan en date du vingt-et-un d'Août, 1875, par lequel Bryson a vendu à ce dernier la même manufacture de fromage, avec tous les effets, instruments et machineries servant à son exploitation, et détaillés au dit acte, et par lequel il lui a aussi transporté tous ses droits et intérêt dans le bail par Cullen à Bryson en date du seize Août, 1875, (le bail ci-dessus mentionné.)

20. D'un acte de vente par le même David Strachan à James Strachan en date du six Janvier, 1879, de la même manufacture de fromage, avec tous les mêmes effets, instruments et machineries servant à son exploitation et détaillés au dit acte ainsi que tous ses droits au bail en question.

30. D'un autre acte de vente et transport du vingt-neuf Mars, 1880, par James Strachan aux défendeurs des mêmes choses et du même bail. Puis ils ajoutent qu'ils ont depuis le vingt-et-un d'Août, 1875, tant par eux que par leurs auteurs ci-dessus nommés, toujours en la possession de la dite manufacture, machineries, etc., et ce en vertu des dits actes.

Le demandeur a répondu généralement. Les parties à l'argument ont respectivement fait reposer le sort de leur cause sur la prétention d'un côté, que la manufacture et les machineries et autres choses en dépendant et saisies en cette cause étaient immeubles, et de l'autre côté qu'ils étaient meubles.

Le demandeur, s'appuyant sur l'article 376 du code civil, prétend que la bâtisse de cette manufacture a pris la qualité d'immeuble dès l'instant de son érection même par Bryson, simple locataire du fonds, cet article déclarant que les fonds de terres et les bâtiments sont immeubles par leur nature, et il prétend que cette bâtisse ne pouvait être transmise à un tiers soit par le locataire Bryson, soit par le

propriétaire du fond, qu'avec les formalités requises pour la transmission des immeubles.

Il a raison en cela suivant Marcadé sur article 518, qui a été copié textuellement par nos codificateurs, et suivant diverses décisions rapportées par Sirey, code annoté sur le même article. Cet auteur et ces décisions expriment clairement l'opinion qu'une bâtisse construite sur un fonds de terre est immeuble par sa nature, quand même elle y aurait été construite par un locataire comme dans le cas actuel, et ce quand même il aurait été stipulé entre le propriétaire et le locataire qu'elle pourrait être enlevée par le locataire à l'expiration du bail, et que cette bâtisse est immeuble par sa nature, non-seulement vis-à-vis le propriétaire du fonds qui peut toujours la retenir en indemnisant son locataire, mais encore vis-à-vis les acquéreurs du locataire même et ses créanciers.

Cela posé, il s'agit maintenant de savoir si les machineries et autres objets saisis revendus, et qui se trouvaient fixés dans la dite bâtisse lors de la vente qui en a été faite ainsi que de la bâtisse et du bail d'abord à David Strachan, l'arrière auteur des défendeurs, le vingt-et-un d'Août, 1875, et ensuite vendus par le même Bryson à Cook, l'auteur du demandeur, devaient être alors considérés comme immeubles par destination, c'est ce qu'affirme le demandeur et que les défendeurs nient. On comprend de suite l'intérêt qu'a le demandeur de les faire considérer comme immeubles, et l'intérêt contraire des défendeurs, car si ces choses étaient immeubles la vente qu'en a faite Bryson à Cook, l'auteur du demandeur, le trente Décembre, 1876, a été rendu parfaite par son enregistrement et doit prévaloir sur celle faite par le même Bryson à David Strachan, l'arrière auteur des défendeurs, parceque cette dernière vente quoique de beaucoup antérieure n'a pas été enregistrée, la tradition faite à Strachan n'ayant en semblable cas aucun effet sans l'enregistrement de son acte. D'après cela il est clair que si ces machineries et autres objets étaient immeubles, (par destination bien entendu,) le demandeur devra en être déclaré propriétaire, si au contraire ils doivent être considérés comme étant alors de simples meubles, la possession des défendeurs et de leurs auteurs devra prévaloir, et les défendeurs devront en être déclarés propriétaires, et la saisie revendication et l'action

du demandeur devront en conséquence être renvoyées.

Pour appuyer sa prétention le demandeur invoque les articles de notre code 379 et 380. L'article 379 s'exprime comme suit: "Les objets mobiliers que le propriétaire place sur son fonds à perpétuelle demeure, ou qu'il y a incorporés, sont immeubles par destination tant qu'ils y restent, ainsi sont immeubles sous ces restrictions les objets suivants et autres semblables: 10. Les pressoirs, chaudières, alambics, cuves et tonnes, 20. Les ustensiles nécessaires à l'exploitation des forges, papeteries et autres usines."

Ainsi deux conditions sont particulièrement requises par cet article pour convertir des objets mobiliers de la nature de ceux mentionnés dans cet article, en immeubles ou les assimiler au fonds auquel ils sont attachés. 10. Qu'ils y aient été placés par le propriétaire du fonds, et 20. Qu'ils y aient été fixés à perpétuelle demeure. Or je ne crois pas qu'aucune de ces deux conditions se rencontre dans le cas actuel, car il est clairement établi en preuve que c'est le locataire Bryson, l'auteur du demandeur, et des défendeurs qui a placés ces machineries et autres objets dans la bâtisse en question. Le demandeur ne peut pas même avoir l'avantage de prétendre qu'il l'ignorait, puisqu'il a acheté ces objets mêmes de Bryson comme appartenant à ce dernier et ayant été placés dans la bâtisse en question par le même Bryson. Il savait que Cullen et non Bryson était propriétaire du fonds, et que la bâtisse et les machineries et autres objets y avaient été placés par Bryson.

Le demandeur n'a pas établi suivant moi la seconde condition exigée par cet article, savoir que les objets ont été placés sur le fonds à perpétuelle demeure; comme je l'ai dit et comme le demandeur est forcé de l'admettre, ces objets ont été placés dans la bâtisse par le locataire Bryson. Le demandeur ne pouvait l'ignorer lorsqu'il les a achetés, parceque le fait ressort même de son contrat d'achat et de celui de son auteur, Cook. Or, il n'est pas à supposer que Bryson, un simple locataire, eut eu l'intention de placer ces objets sur un fonds ne lui appartenant pas, à perpétuelle demeure; je ne le pense pas; et le demandeur et son auteur eux-mêmes n'ont pu le croire un instant puisqu'ils savaient que Bryson n'avait loué que pour un temps limité, et qu'ils ont acheté ces mêmes objets de

lui avec l'intention évidente de les enlever et non de les laisser au propriétaire du fonds.

Mais, dit le demandeur, c'est vrai que ces objets ont été placés par un locataire à ma connaissance même, mais ils ont été placés à fer et à clous, et cela est suffisant pour faire présumer, en loi, qu'ils y ont été placés à perpétuelle demeure.

En lisant l'article 380, aussi invoqué par le demandeur, et qui s'exprime comme suit:—"Sont censés avoir été attachés à perpétuelle demeure les objets placés, par le propriétaire, qui tiennent à fer et à clous, qui sont cellés en plâtre, à chaux, ou à ciment, ou qui ne peuvent être enlevés sans être fracturés, ou sans briser ou détériorer la partie du fonds à laquelle ils sont attachés." Il me semble, et il me paraît même clair que cet article n'établit cette présomption que pour le cas où semblables objets ont été placés ainsi par le propriétaire, et non par un locataire; qu'ils avaient été placés à fer et à clous, cela ne détruit pas la présomption qu'ils ont dû l'être pour un temps limité. S'ils l'ont été par un locataire, dans ce cas, le propriétaire peut bien, en vertu de l'article 1640 qui sert à régler les rapports du locataire et du propriétaire, retenir les objets en en payant la valeur, mais non pas parcequ'ils sont devenus immeubles, comme le fonds auquel ils sont attachés, mais seulement à raison des dispositions spéciales de la loi réglant les droits et obligations des locataires et locataires entre eux. Ce dernier article n'a pas l'effet de changer la nature des meubles en immeubles comme ceux cités plus haut, mais seulement, comme je viens de le dire, de déterminer les droits et obligations respectifs des locataires et locataires en semblable cas, et il n'a pas l'effet de modifier en rien les articles 379 et 380 quant aux conditions requises pour convertir un meuble en immeuble par destination.

D'après ces raisons, je suis de l'opinion que les objets en question étaient, lors des ventes en question et ce vis-à-vis des parties en cette cause, de simples meubles, et que, conséquemment, le titre des défendeurs à ces meubles, suivi de la tradition et possession, doit prévaloir sur celui du demandeur qui n'a pas été suivi de tradition. L'action du demandeur et sa saisie revendication sont en conséquence renvoyées et mises de côté quant à tous les objets saisis et revendiqués, à l'exception, toutefois, de l'engin qui n'a pu être compris dans la vente à David

Strachan, l'arrière auteur des défendeurs, car il est prouvé qu'il n'a été placé dans la bâtisse en question que longtemps après.

L'action et la saisie revendication sont maintenues, mais quant à l'engin seulement et elles sont déboutées quant au reste, chaque partie payant ses frais.

J. J. Maclaren, for plaintiff.

D. L. McCormick, for defendant.

AGREEMENTS BETWEEN ATTORNEY AND CLIENT.

MASSACHUSETTS SUPREME JUDICIAL COURT, October
10, 1881.

ACKERT v. BARKER.

An agreement between an attorney, employed to collect an account, and his client, that the former is to receive as compensation for his services one-half of the sum collected, is unlawful in Massachusetts.

Contract for money had and received, to recover \$1,000, collected by an attorney at law. The defendant contended that he had a right to retain one-half of the amount received, by virtue of an agreement to that effect with the plaintiff, his client, in consideration of professional services rendered by him in collecting said sum. The defendant testified to such an agreement; and that he was not to be responsible for any of the expenses of collection.

The judge ruled that the agreement was unlawful. The jury returned a verdict for the plaintiff for \$808, and the defendant alleged exceptions.

GRAY, C. J. The defendant's answer and bill of exceptions, fairly construed, show that the agreement set up by the defendant was an agreement by which, in consideration that an attorney should prosecute suits in behalf of his client for certain sums of money, in which he had himself no previous interest, it was agreed that he should keep one-half of the amount recovered in case of success, and should receive nothing for his services in case of failure.

By the law of England from ancient times to the present day such an agreement is unlawful and void for champerty and maintenance, as contrary to public justice and professional duty, and tending to speculation and fraud, and cannot be upheld, either at common law or in equity. 2 Rol. Ab. 114; Lord Coke, 2 Inst. 208, 564; Hobart, C. J., *Box v. Barnaby*, Hob. 117 a; Lord Nottingham, *Skapholme v. Hart*, Finch, 477; S. C., 1 Eq. Cas. Ab. 86, pl. 1; Sir

William Grant, M. R., *Stevens v. Bagwell*, 15 Ves. 139; Tindal, C. J., in *Stanley v. Jones*, 7 Bing. 369, 377; S. C., 5 Moore & Payne, 193, 206; Coleridge, J., *In re Masters*, 1 Har. & Wall. 348; Shodwell, V. C., *Strange v. Brennan*, 15 Sim. 346; Lord Cottenham, S. C. on appeal, 2 Coop. Temp. Cottenham, 1; Earle, C. J., *Grell v. Levy*, 16 C. B. (N. S.) 73; Sir George Jessel, M. R., *In re Attorneys & Solicitors' Act*, 1 Ch. D. 573.

It is equally illegal by the settled law of this Commonwealth. *Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Amherst Bank*, 9 Metc. 489; *Sweet v. Poore*, 11 Mass. 549; *Allen v. Hawks*, 13 Pick. 79, 83; *Call v. Calef*, 13 Metc. 362; *Rindge v. Coleraine*, 11 Gray, 157, 162; 1 Dane Ab. 296; 6 id. 740, 741. In *Lathrop v. Amherst Bank*, the fact that the agreement did not require the attorney to carry on the suit at his own expense was adjudged to be immaterial. 9 Metc. 492. In *Scott v. Harmon*, 109 Mass. 237, and in *Tapley v. Coffin*, 12 Gray, 420, cited for the defendant, the attorney had not agreed to look for his compensation to that alone which might be recovered, and thus to make his pay depend upon his success.

The law of Massachusetts being clear, there would be no propriety in referring to the conflicting decisions in other parts of the country. If it is thought desirable to subordinate the rules of professional conduct to mercantile usages, a change of our law in this regard must be sought from the Legislature and not from the courts.

The defendant, by virtue of his employment by the plaintiff, and of his professional duty, was bound to prosecute the claims intrusted to him for collection, and holds the amount recovered as money had and received to the plaintiff's use. The agreement set up by the defendant that he should keep one-half of the amount, being illegal and void, he is accountable to the plaintiff for the whole amount, deducting what the jury have allowed him for his services and costs. *In re Moshers and Grell v. Levy*, above cited; *Pearce v. Beattie*, 32 L. J. (N. S.) Ch. 734. Of *Best v. Strong*, 2 Wend. 319, on which the defendant relies as showing, that assuming this agreement to be illegal, the plaintiff cannot maintain this action, it is enough to say that there the money was voluntarily paid to the defendant with the plaintiff's assent, after the settlement of the suit by which it was recovered; and it is unnecessary to consider whether, upon the facts before the court, the case was well decided.

Exceptions overruled.

The Legal News.

VOL. IV. NOVEMBER 19, 1881. No. 47.

ESCHEAT.

An important question has been decided by the Supreme Court in the case of Mercer, in which judgment was rendered on the 14th inst. The question was whether the right of escheat pertains to the Dominion or the local Government. The case is from Ontario, where the decision was that the *droit de déshérence* is in the local Government. This opinion appears to have been sustained by Chief Justice Ritchie and Mr. Justice Strong, who dissented from the judgment rendered by the majority, composed of Justices Fournier, Henry, Taschereau, and Gwynne.

WOMEN IN OFFICE.

The courts of this continent have not unselfishly passed upon the questions which arise from the claims of women to be admitted to the professions and offices usually filled by the other sex. The Court of Common Pleas, in Pennsylvania, in deciding (in the case of *Evans v. Ives*) that a woman may act as arbitrator, has disinterred a quantity of lore on the subject, and shown that some women, at any rate, held important offices in the olden time.

"In West's Symboliography, 163, it is said that a married woman cannot be an arbitrator. This however is the rule of the civil law. Justinian says that it is contrary to the proper character of the sex to allow a woman to intermeddle with the office of a judge. Kyd's Awards, 71; Wood's Civil Law, 327. In Kyd on Awards, 70-1, it is said that an unmarried woman may be an arbitrator. To sustain this the author cites the *Duchess of Suffolk* case, 8 E. 41; Br. 37. In 2 Petersdorff's Abr. 129, it is said that it is no objection to an award that the arbitrator is a married woman. Gentlewomen have also held and exercised judicial authority. Annie, countess of Pembroke, held the office of sheriff of Westmoreland, and exercised the duties thereof in person. At the Assizes of Appleby she sat with the judges on the bench. Hargr. Co. Lit. 326; 8 Bac. Abr. 661. Her right to sit upon the bench as a judge will be

fully understood when it is borne in mind the sheriffs at that time held court and exercised judicial power. Sheriffs had power to inquire of all capital offences, and issue process and enforce the same. But this power was afterward restrained. By Magna Charta, ch. 17, it was enacted: 'That no sheriff shall hold pleas of the crown.' 8 Bac. Abr. 688. Eleanor was appointed lord keeper of England. It would seem from the history of this noble woman that she actually performed the duties of lord chancellor in person. It is said of her that in the summer of 1235 King Henry appointed her lady-keeper of the great seal. She accordingly held the office nearly a whole year, performing all the duties, as well judicial as ministerial. She sat as a judge in the *Aula Regia*. These sittings were however interrupted by the *accouchement* of the judge when she was delivered of a daughter. After retiring from the bench, and the appointment of her successor, she was delivered of a boy, who afterward became Edward I of England. 1 Camp. L. L. Ch. 134-7. Without referring in any manner to Eve, the first arbitrator appointed in this world to decide the controversy about eating the forbidden fruit, or to the manner Deborah judged Israel, we are clearly of the opinion that under the act of 1836 a woman, married or single, may be appointed arbitrator, and may act as such, and make a valid award."

THE LATE MR. JOHN MONK.

A long familiar face has disappeared from Court circles. Mr. John Monk, admitted to practice in January, 1841, died during the present month. Mr. Monk, for a considerable time, had the largest practice in the Circuit Court that fell to the lot of any English-speaking member of the bar, a department of professional activity for which his great physical energy and buoyant disposition eminently qualified him. While loyal to his clients, Mr. Monk was too manly to take an unfair advantage of his opponent. To his juniors he was always kind and considerate. The result of many years of close industry and unremitting attention to business was the accumulation of a handsome competence which, unfortunately, he did not live to enjoy. His last years were clouded by ill-health and suffering, and death came at the early age of 62.

CORRESPONDENCE.

CROOKED COURSES.

To the Editor of THE LEGAL NEWS:

SIR,—I am glad to notice two letters bearing upon the subject of legal ethics in your last issue.

I take it for granted that in theory, at least, the traditions of the English and French Bars respecting the solicitation of work are still deemed worthy of respect, veneration and perpetuation. Let me, then, cite what I consider a gross breach of professional etiquette. Several firms in this city are the agents of Collection Concerns which employ canvassers to drum up business among merchants and others; the Collection Concern agreeing to charge no fees unless a collection is effected, on condition that a per centage be allowed the lawyers of the Concern—who in some cases are the principals—when the debt is collected. As I have said, I consider this "touting" totally unprofessional and undignified, and as I find that many of my clients are being allured into the offices of the advocates who run these machines, I have determined, should the Council of the Bar afford us no redress, to engage a brass band to play at my office door, and to invite passers-by to step in and get "first class law at bottom prices."

Yours truly,

THEMIS.

ADVOCATE AND ASSIGNEE.

To the Editor of THE LEGAL NEWS:

SIR,—I am sorry to trouble you again, but you have evidently mistaken the question referred to by me last week.

The question is not at all as to the winding up of a few estates under the old Act, but as to the right of an advocate to make a practice of touting for estates now, making use of his position as a lawyer to aid him in getting the estates, and of his position as "assignee in trust" to give himself all the law business arising out of them.

Your opinion on this practice would oblige quite a number, both of advocates and assignees.

Yours truly,

ADVOCATE.

MONTREAL, NOV. 16, 1881.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, Sept. 20, 1881.

DORION, C. J., MONK, RAMSAY, TESSIER, CROSS, JJ.
CORPORATION OF VILLAGE OF L'ASSOMPTION (plff.
below), Appellant, and BAKER (def. below),
Respondent.

Municipal corporation—Purchase on credit.

RAMSAY, J. This action was brought on a deed purporting to be a deed of sale from the Babcock Manufacturing Co., acting by its agent, Homer Baker, to the Municipal Council of the incorporated village of L'Assomption, acting by Moise Chevalier, one of the councillors, of a Babcock fire engine. The price was to be \$3,000 payable within the term of six months, to be computed from the 15th day of July then last past, with interest at 6 per cent. Under this contract the engine was delivered to the appellant, who refused, after some time, to pay for it, and Homer Baker in his own name, and as if he had been the real proprietor, and not the agent, as described in the deed, sued the appellant.

A variety of objections have been taken to the action, some of them of a technical character, others substantial. It is said that the deed is between the Municipal Council of the incorporated village of L'Assomption, and the Babcock Manufacturing Co., and consequently that the plaintiff has no interest to bring the action, and that the appellant is not a party to the contract. It is also contended that there was no lawful meeting of the council to authorise the purchase, and that the purchase was not made in the terms of the pretended resolution, but that authority was only to purchase from "Omer & Baker" and not from "Homer Baker."

These objections appear to me to be unfounded. There can be no doubt that the body purchasing was the corporation appellant, and that it is bound by the act of the Council, if the Council acted within its powers. Again, Homer Baker had a right to declare on the contract as having been conveyed to him, not as a factor but as owner. It would, therefore, only have been a question of signification. But in addition to this it seems to me article 1738 applies. It seems to me that the regularity of the proceed-

ings of the Council, acting colorably within its attributions, cannot be called in question by the Corporation, unless there has been some fraud in which the plaintiff was implicated. The delay of six months in the payment of the engine, subject to interest at six per cent., was no substantial deviation from the resolution. It was a stipulation in favor of the Corporation, which created no additional obligation. The Corporation might have paid at once. The difference between Homer Baker and Omer & Baker is not more than a clerical error, and where two languages are in use, may very well pass as *idem sonans*.

The substantial pleas to the action are:—

1st. That the Council had no authority to bind the Corporation by such a contract; that they could only purchase for cash, or with cash on hand, or after having procured means to purchase by direct taxation.

There seems to be no sort of authority for these pretensions. The general authority to purchase fire-engines and machines for the extinction of fire, is especially given to village corporations by Art. 663 of the Municipal Code, and I can find no limitation to this general rule, either to the effect that the corporation must purchase with cash, or pass a by-law to provide for the payment. There is no general principle which prevents a corporation from buying on credit. It was said that the Government could not contract a debt without the authority of Parliament, and that therefore a corporation cannot. But this is an error. The Government can contract a debt without the authority of Parliament, and it is just because it can bind the public revenues that it is unconstitutional for Ministers to incur great expenditure without having the means provided beforehand. This principle has only been partially applied to corporations as matter of law, and for transactions beyond the ordinary scope of corporate undertakings, as, for instance, taking stock in a railway or any other enterprise.

The next objection is that the machine was worthless, or only worth \$500 at most, and that the corporation had at once repudiated the contract on account of the worthlessness of the machine. This objection has necessitated our reading the voluminous evidence. I do not consider the case of Archambault and the Cor-

poration of L'Assomption part of the evidence, or indeed that it has anything to do with the case. The respondent was not a party to that suit, in which no rights analogous to his were in issue. The evidence is extremely spun out, and if the control contemplated by law were exercised by the Judge presiding at enquête, we should have the administration of justice facilitated. The labor and difficulty of the Courts called on to appreciate the evidence would be decreased, and suitors would be saved great expense. It is no easy matter to winnow so small a quantity of wheat from such an enormous quantity of chaff. There are repetitions which might have been dispensed with, and there are repetitions which are needless. For instance, over and over again we are told the story of a little fissure in a brass moulding which could have nothing to do with the quality of the machine. The unimportance of the story was shown at once, yet it is insisted upon again and again as if it were a bit of evidence learned by rote. The real issue of fact is mixed up with another question, and that is whether it was prudent or wise of the corporation to buy a Babcock engine at all. Unless it could be proved beyond controversy that such an engine is totally useless as a fire-engine, in fact a fraudulent pretext for obtaining money, this would be no sort of defence to this action. But there is no such evidence in the record. On the contrary, appellant's first witness, Charles Garth, describes the use of such an engine, and says that the engine bought on his recommendation resembles the one in question. He is of opinion that it is only useful as an auxiliary, but he considers a Babcock to be very useful in towns or cities. His evidence negatives the idea that the Babcock is wholly unfit for the purpose for which it was sold. We next come to the evidence of the worthlessness of the Babcock in question. And here we are met by a proposition which was persistently urged on our attention at the argument. We were told that there was really no acceptance of the engine. As a matter of fact, it seems perfectly proved that the Babcock was received by the Council. It can scarcely be contended that the acceptance by the Council, in the absence of fraud, is not equivalent to an ordinary acceptance, and that by such acceptance the corporation is bound. In this case it seems per-

factly clear that there was no fraud or connivance between the Council and the respondent, and the whole question, therefore, resolves itself into this—was the Babcock in question a merchantable machine of its kind? As I have already said, there is the receipt and delivery after trial, which was considered to be satisfactory. It is idle now to come and say that it was not a satisfactory trial. The difficulties at the trial seem to be sufficiently explained by the want of a drilled fire brigade, which, it appears, is required for the proper management of an engine of this sort, and material. We, therefore, come down to the question of general and special warranty. That the Babcock has not been used at fires in L'Assomption is neither here nor there in the argument; but it is contended that the engine is useless, that the truck looks well, but is badly made and of bad material; that the ladders and hooks are of the wrong sort of wood, and that these defects are covered over with paint, and the eye deluded with shining brass. In support of this, witness after witness is produced; all say the same things, or nearly so, with some intensification as the case proceeds, to cover over the cross-examination of the preceding witness. The general tenor of the evidence conveys the idea of an effort by the witnesses to get rid of a bargain which they find does not suit them. But when we come to the evidence of a witness like Mr. Louis Archambault, who is on his guard as to the value of words, we find the whole case fairly stated. He admits that a Babcock is useful in the extinction of fire. He did not think it useful in a fire such as that he saw, but he observed that the liquid extinguished the flames when it fell, but did not stop the fire, and why?—the liquid they had was exhausted. He admits that he said that the liquid, although in small quantity, had a great effect on the fire. And he frankly gives us the key of the whole contestation: "Cet instrument ne répond pas aux besoins du village de l'Assomption." And what has Mr. Homer Baker to do with that? This is the testimony of a vigorous opponent of those who purchased the Babcock. Again, no one pretends that the small Babcocks were not efficient. Mr. Moise Chevalier also tells us that when he was at the fire he observed: "*Que la où son jet (le jet du Babcock) atteignait, le feu s'éteignait.*" Mr. Levesque gives similar testimony.

Judgment confirmed.

Trudel, DeMontigny & Charbonneau for Appellants.

Greenshields & Busted for Respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, Sept. 23, 1881.

DORION, C.J., RAMSAY, TESSIER, CROSS, BABY, JJ.

REG. V. MALOUIN.

Reserved case—Speedy Trial Act.

The judge of sessions, trying cases under the Speedy Trial Act, has no power to reserve a case for the Court of Queen's Bench sitting in appeal and error.

RAMSAY, J. This is a case reserved by the Judge of Sessions at Montreal, the object being to obtain the opinion of the Court upon the question whether the Quarter Sessions can try a case of forgery created felony by statute. The first difficulty in the case is whether this Court has any jurisdiction under the statute to hear a case reserved by the judge of Sessions trying a case under the Speedy Trial Act. The Act makes that court a court of record, but describes it as proceeding out of Sessions. The Act which grants the criminal appeal is very special. It says "when any person has been convicted of any treason, felony or misdemeanor, at any criminal term of the said Court of Queen's Bench, or before any Court of Oyer and Terminer, gaol delivery or quarter sessions, the court before which the case has been tried, may, in its discretion, reserve any question of law which has arisen on the trial, &c." The question is whether the speedy trial court comes under any of these denominations. The Court is of opinion that the provisions of the law allowing a speedy trial in certain cases creates a new jurisdiction, and the law as to reservation of cases does not apply to it. The rule is that the appeal cannot be extended beyond the cases laid down. The court has therefore come to the conclusion that it has no jurisdiction to decide the question submitted. The reserved case must be sent back.

Ouimet, Q.C., for the Crown.

COURT OF QUEEN'S BENCH.

MONTREAL, Sept. 20, 1881.

DORION, C.J., RAMSAY, TESSIER, CROSS, BABY, JJ.

DORION et al., (defts. below), Appellants, and LORANGER, Atty.-Gen. (plff. below), Respondent.

Acting as a corporation—C.C.P. 997.

The appeal was from a judgment of the Superior Court, Montreal, Torrance, J., March 15, 1881, declaring the appellants to have been members of a pretended corporation known as the "Silver Plume Mining Company," illegally formed, and prohibiting them from acting in future as members, directors or officers of such illegal corporation. The judgment of the Court below, which will be found at p. 108 of this volume, was unanimously confirmed.

Ritchie & Ritchie, for Appellants.

Barnard, Beauchamp & Creighton, for Respondent.

SUPERIOR COURT.

MONTREAL, October 29, 1881.

Before TORRANCE, J.

LAURENT V. THERIAULT.

Undischarged Insolvent—Costs.

The plaintiff's action was against an insolvent who had not obtained his discharge, for a debt incurred previous to the assignment.

PER CURIAM. The question here is simply whether plaintiff should have costs against the defendant who is an uncertificated insolvent under the Insolvent Act, 1875. Mr. Justice Mackay informed me that he had already granted a judgment in a similar case without costs. I shall follow his ruling here and let the plaintiff take judgment without costs.

Roy & Boutillier, for plaintiff.

T. & C. C. DeLorimier, for defendant.

SUPERIOR COURT.

MONTREAL, Oct. 29, 1881.

Before TORRANCE, J.

BELANGER V. CONTANT, SMART, opposant, and plaintiff, petitioner, contentant.

Alteration of record—Rejection of additions.

This was a petition by plaintiff, complaining that certain words and figures had been unlawfully inserted in the opposition of Smart, after the filing thereof, and praying that said words and figures be rejected. The plaintiff had taken in execution four lots of land under the sub-division numbers 27, 30, 31, of official number 159 E, and official number 160 of the plans of the village of Côte de la Visitation. The

complaint of plaintiff was that Smart, by his opposition filed on the 14th August, had opposed the sale of three of the lots, namely 27, 31, & 160, that subsequently to 8th September, 1880, the marginal note on the *verso* of first page of said opposition, namely "and of lot 30 of 159 E:" the marginal note of the *recto* of the second page of said opposition, namely "thirty and thirty one," and the marginal note on the *verso* of second page of said opposition, namely: "and of 30 of 159 E," had been illegally and fraudulently made and written since 8th September 1880, and all said words were false and forged, and that the figures 30 in the middle of the 10th line of the *recto* of the second page of said opposition were also false and forged: and made over the figures 27 since 8th September, 1880.

PER CURIAM. This is a matter of proof, and the evidence of Arthur B. Longpré and Alexis Brunet, two members of the bar, is positive as to the falsification. The petition is therefore granted.

A. B. Longpré, for petitioner.

C. S. Burroughs, for opposant.

SUPERIOR COURT.

MONTREAL, Oct. 29, 1881.

Before TORRANCE, J.

CREVIER V. LA SOCIÉTÉ D'AGRICULTURE DE BERTHIER.

Sale of horse—Action quanto minoris.

The action was to recover \$224 alleged to be due on account of the sale of a horse. The sale was made on the 15th March, 1880, for the price of \$575, of which \$200 was cash, \$200 in a year, and \$175 in two years. The amount now claimed was the first instalment with interest, and acknowledged by a note signed by the President and Secretary of the Society. The plea was firstly that the society could not be liable on the note as by law it could not make a note; secondly, that there was a warranty and representation at the sale that the horse was only seven, and that he was free from vices, whereas he was eleven, and suffered from redhibitory vices.

PER CURIAM. The court has no difficulty in overruling the plea invoking the nullity of the note. The action is not on the note, but on the sale for a price of \$575, and the note may be

used as evidence of the sale, which is also abundantly proved by witnesses. The serious question is whether the defendant has not been too late in pleading the redhibitory vices. The action was instituted in May, 1881, more than 14 months after the sale and delivery of the horse. He is kept by the society which claims that the price already paid, \$200, is the full value of the animal, and that it should be discharged from the present claim. The evidence on the issue raised by the second plea, as to the warranty and representation, is very contradictory, but the court has no difficulty in overruling the plea of *quanto minoris*, as invoked too late. It is not to be supposed that an action for resiliation for redhibitory vices would lie in the present case after lapse of more than a year. C.C. 1530. The action *quanto minoris* has only the same duration. "Parminous," says Pothier, Vente, no. 233, "l'action *quanto minoris*, pour 'raison des vices redhibitoires, se prescrit par 'le même temps que l'action redhibitoire.'" Judgment for plaintiff.

St. Pierre & Scallon, for plaintiff.
Archambault, for defendant.

SUPERIOR COURT.

MONTREAL, Oct. 29, 1881.

Before TORRANCE, J.

THE COLONIAL BUILDING AND INVESTMENT ASSOCIATION v. FLETCHER.

Building and Investment Association—Legality of Incorporation by Dominion Legislature.

The action was against a shareholder of 47 shares, to recover arrears of calls amounting to \$16,490.81. Defendant pleaded that on the 9th November, 1877, he became transferee of 47 shares from William Rodden, on the representation that the association was solvent, and that there were no arrears due. That he had since discovered that plaintiff was not legally incorporated, and was insolvent, and the illegality was being tried by a petition (*quo warranto*) before Mr. Justice Caron. That, in fact, the association was illegal, and the calls could not be claimed. That at the date of the transfer, the association was insolvent to the knowledge of plaintiff and its officers, and said Rodden. That the transfer to defendant had been obtained by *dol* and fraud.

PER CURIAM. The plaintiff was incor-

porated by 37 Vic. cap. 103 of the Dominion Legislature. It is empowered to carry on business, and hold lands generally without any limit as to location, and the association may make, endorse and accept promissory notes and bills of exchange. By s. 17, no share shall be transferrable until all previous calls thereon have been fully paid in, but this is for the protection of the association. In the present case the evidence is that Rodden, Fletcher and the association agreed that the transfer should be made to Fletcher; and the latter knew precisely the position of matters, and was not in the least degree deceived. As to the insolvency, that is not proved. The demand now is for arrears accrued since Fletcher became shareholder, and he should pay. As to the illegality of the association, it is not proved, and it is not proved that the powers given to the association by the Dominion Legislature were beyond its powers, or any encroachment on the rights of the Provincial Legislature. The association had banking powers, and surely they were within the scope of the Dominion Legislature.

Robertson & Fleet for plaintiff.

Girouard & Wurtele for defendant.

SUPERIOR COURT.

MONTREAL, Oct. 29, 1881.

Before TORRANCE, J.

MACKAY v. FLETCHER, and ST. JULIEN et al., garnishees.

Execution—Agreement releasing claim on moveables—Interpretation.

The plaintiff had a judgment against defendant for \$3,498.48. He seized in execution his moveables, and they were advertised to be sold on the 3rd February last. On the 1st February, plaintiff by his agent made an agreement with the defendant which was duly carried out in the following words:

RIGAUD, 1st February, 1881.

JOHN FLETCHER, Esq.

DEAR SIR,—In consideration from receiving from you the sum of three hundred dollars in notes endorsed by D. Brulé, Esq., at twelve, eighteen and twenty-four months, I hereby now release all claim to the moveables seized for my account by bailiff D. A. St. Amour, to be

sold at your domicile the 3rd instant, on account of said debt.

I am, dear Sir,
Your truly,

W. L. MALTRY,
Attorney for Edward Mackay.

Following this, on or about the 12th February, plaintiff lodged in the hands of several garnishees, an attachment against moneys of defendant in their hands for the entire amount of the judgment, without giving credit for the \$300 secured by the notes mentioned above. The defendant therefore contested the attachment so far as the \$300 were concerned, and asked that the attachment *pro tanto* be annulled.

PER CURIAM. The Court has no doubt as to the conclusion at which it should arrive. So far as the \$300 were concerned, the letter suspended the execution of the judgment till the notes fell due. This is the legal effect of the agreement, whatever Mr. Maltby, the agent of the plaintiff, intended, for he says positively that the agreement was not to interfere in any way with the judgment. The contestation will therefore be maintained, and the seizure annulled so far as regards the \$300.

Robertson & Fleet for Plaintiff.

Champagne & Nantel for Defendant.

RECENT DECISIONS AT QUEBEC.

Charter party—Larceny by bailee.—A difficulty having arisen between the shipper and the master of the vessel as to the exact quantity of goods shipped, each tendered a bill of lading in conformity with his pretensions as to the quantity of cargo received. A writ of revindication was then issued at the instance of the shipper to attach the cargo, and a guardian appointed by the sheriff. While the cargo was so under seizure and in charge of the guardian the master put to sea, but was overtaken and brought back to Quebec, on an accusation of larceny. *Held*, that, under the circumstances, there was no *animus furandi* and therefore no larceny, even *custodia legis*. 2. That the criminal law cannot be resorted to for the enforcement of claims, the proper legal remedy for which, if any, is a civil one.—*Reg. v. Sulis*, Special Sessions of the Peace. Opinion per Chauveau, J.S.P., 7 Q.L.R. 226.

Seduction—Damages.—Jugé, que les dommages réclamés par la fille séduite ne sont, à part les frais de gésine, dus que pour l'inexécution de la promesse en mariage que la séduction fait présumer, et que le concubinage pendant plus de trois ans de la fille avec son séducteur, et son allégation qu'elle n'a cédé la première fois que sur ses assurances qu'il n'y avait pas de danger pour elle, et qu'il la marierait si elle devenait grosse, détruisent cette présomption, et ne lui permettent pas de recouvrer plus que ses frais de gésine.—*Turcotte v. Natché*, (Cour de Révision), 7 Q.L.R. 230.

Discontinuance—Congé défaut—Costs—Exception.—Failure to return the writ of summons is not a discontinuance within the meaning of Art. 453, C.C.P.—*Hossack v. Paradis*, (Court of Review), 7 Q.L.R. 234.

Attorney—Bailliff's fees.—An attorney *ad litem*, employing a bailliff to execute a writ, and making a special agreement with him as to his charges, without stipulating that he is not contracting for himself, becomes personally liable towards the bailliff.—*Panneton v. Guillet*, Circuit Court, Three Rivers; opinion by McCord, J. 7 Q.L.R. 250.

School Teachers—Engagement.—Jugé, que les engagements des instituteurs sont des contrats subsistant tant que les commissaires ne leur ont pas signifié, deux mois avant leur expiration, qu'ils n'entendent pas les continuer; que cette décision des commissaires ne peut être adoptée qu'à une assemblée du bureau, et qu'elle doit être signifiée par écrit.—*Gawron v. Commissaires d'Ecole de St. Louis de Lotbinière*, Cour de Circuit, Québec, opinion by Casault, J.—7 Q.L.R. 251.

Offer of engagement—Acceptance.—An offer of engagement having been made to a school teacher by a corporation of school commissioners, without any limit of time for acceptance, and not having been withdrawn, the teacher could validly bind them, and effect the engagement by her verbal or written acceptance given at a regular meeting of the commissioners, about twelve days afterwards, notwithstanding that in the interval she had, in answer to a demand made to her by individual members of the corporation, refused to accept the offer.—*Devarennes v. Hallé et al.*, Court of Review, 7 Q.L.R. 252.

Saisie-arrest avant jugement—Affidavit—Incertitude.—Jugé, qu'il n'y a pas d'incertitude dans

l'allégation que le défendeur a l'intention de frauder ses créanciers ou nommément le demandeur, et que la saisie-arrest avant jugement, émanée sur une déposition qui ne pêche pas sous d'autres rapports, doit être maintenue.—*Arcand v. Flanagan*, Cour de Circuit, jugement par Casault, J., 7 Q.L.R. 256.

RECENT ENGLISH DECISIONS.

Contract to compromise criminal prosecution—Larceny by bailee.—A having been arrested at the instance of B., on the charge of having committed the offence of larceny by a bailee, was brought up before a magistrate and remanded. A's wife then induced B. to withdraw from the prosecution, on A's wife agreeing to charge her separate real estate with the amount taken. The title deeds of the property were deposited at a bank in the joint names of the solicitors of the parties. A. being again brought before the magistrate, the latter having been informed of the terms, allowed the prosecution to be withdrawn. A's wife afterwards refused to perform her agreement. B. brought an action to enforce the charge, and A's wife counter claimed for a declaration that she was entitled to have the deeds delivered up to her. *Held*, that the agreement to charge the separate property was illegal and could not be enforced, and that the defendant was not entitled to the declaration for delivery of the deeds.—*Larceny by a bailee* is felony, but, if it had been a misdemeanor, the agreement to charge in consideration of the withdrawal of the prosecution would have been void.—*Whitmore v. Farley*, Court of Appeal, May 14, 1881.—45 L.T. Rep. (N.S.) 99.

Copyright—Newspaper.—A newspaper is within the Copyright Act (5 & 6 Vict. c. 45), and requires registration under that Act in order to give the proprietor the copyright in its contents, and so enable him to sue in respect of a piracy. Also, to enable the proprietor of a newspaper to sue in respect of a piracy of any article therein, he must show, not merely that the author of the article has been paid for his services, but that it has been composed on the terms that the copyright therein shall belong to such proprietor.—*Walter v. Howe*, L.R. 17 Ch. D. 708.

Principal and surety.—A. having borrowed a sum of money, which he failed to repay, his

four sureties contributed equal amounts to make up the sum. Two of them, when becoming sureties for A., had, unknown to the other two, obtained from him an assignment of certain property as a security against any loss they might sustain in consequence. *Held*, that the other two sureties were also entitled to the benefit of the assignment. Where a surety obtains from the principal debtor a security for the liability he has undertaken, he is bound to bring into hotchpotch, for the benefit of his co-sureties, any benefit which he receives under the security; though he originally bargained with the principal debtor that he should have the security, and the fact of the bargain and of the security having been given was unknown to the co-sureties.—*Steel v. Dixon*, Chancery Division, March 29, 1881.—45 L.T. Rep. (N.S.) 142.

RECENT U. S. DECISIONS.

Contempt—Injunction—Violation by Corporation.—A railroad company was enjoined from discriminating against an express company, and certain rates were directed to be charged for express freight. *Held*, that the railroad company, a corporation, could be punished for violating the injunction, by a fine.—*United States ex rel. Southern Express Co. v. Memphis & Little Rock R. Co.*, 7 S.L.R. 472.

Damages—Surface water.—A city, in grading its streets and constructing gutters thereon for carrying off surface water, is not bound to provide against extraordinary storms, such as private persons of ordinary prudence do not usually anticipate and provide against.—*Allen v. City of Chippewa Falls*, 7 S.L.R. 479.

Directors, profit by, at expense of Corporation.—All arrangements by directors of a corporation to secure an undue advantage to themselves, at its expense, by the formation of a new company as an auxiliary to the original one, with the understanding that any of them are to take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are fraudulent and incapable of enforcement by the courts.—*Wardell v. Union Pacific R. Co.*, 7 S.L.R. 480.

The Legal News.

VOL. IV. NOVEMBER 26, 1881. No. 48.

THE BAR.

Some new by-laws were adopted by the General Council of the Bar on the 8th of the present month, and as these regulations furnish an answer to certain questions recently put by correspondents in relation to rules of professional conduct, solicitation of business, etc., we think it may be useful to place them before our readers. They are as follows:—

MAINTENANCE OF DISCIPLINE, HONOR AND DIGNITY.

V.

No member of the Bar shall at any time or on any pretext whatever, or for any purpose whatever, commit any or either of the acts prohibited in the next following Article; and members are hereby forbidden from exercising any profession, trade or industry other than the profession of Advocate, Solicitor, Barrister, Proctor, Attorney and Counsel-at-Law; and members are hereby forbidden to hold any office of profit or emolument, or employment whatever outside of the said profession of Law, (except those mentioned in Article IX of these By-Laws), or voluntarily to perform or assist in the performance of any act, service or duty appertaining to any office hereby forbidden, or any act usually performed by any such office holder or public functionary; and any member contravening this article shall be deemed and held to have committed a breach of the discipline of this Corporation, and shall be liable to punishment as provided in Section 25 of the said Cap. 27, 44 and 45 Vic., the whole subject, nevertheless, to the provisions of Article X of these By-Laws.

VI.

Whereas every member of the Bar owes to his fellow members the obligation of governing his life and conduct in accordance with the principles of honor, justice and morality, it is hereby declared that each of the following acts, when committed by a member of the Bar, is derogatory to the honor and dignity of the legal profession, to wit:

1°. Improperly revealing any secret of the profession, or any communication imparted in confidence by a client.

2°. Communicating to the newspapers or for publication any imperfect or false report of proceedings before the courts, or any report, with intent to injure or degrade a *confrère*.

3°. Practising any deceit or surprise upon a *confrère* with a view to gain in a pending cause an advantage which there is good reason for believing could not be gained without such improper practice.

4°. Abandoning a client on the day or on the eve of the trial of his cause, without having previously given him the opportunity of engaging other professional aid.

5°. Acquiring a litigious right, or a debt of any kind, with the intent and purpose of instituting legal proceedings thereon, and of earning fees therefrom.

6°. Soliciting clients, or business, or bargaining in any way with an *officier ministériel* or with an *agent d'affaires*.

7°. Accepting a salary in lieu of the regular tariff fees which, in exchange for the salary, are abandoned to the client, or making in advance any arrangement whereby a reduction or composition of the regular tariff fees may be effected.

8°. Dividing fees with a client for the sake of retaining his business, or making any arrangement whereby clients shall participate or have an interest in the fees.

9°. Undertaking any professional business under an arrangement to participate in the result, or agreeing, or consenting to trust to the result for remuneration, or in any way to speculate in or upon the result of litigation.

10°. Wrongfully withholding any monies, papers, books, documents or property belonging to clients or others.

11°. And any member who shall be convicted of any or either of the said acts, or of any action which the Council of a Section, on the trial of a complaint, shall deem to be derogatory to the honor and dignity of the profession, shall be liable to punishment, as set forth in section 25, cap. 27, 44 and 45 Vic., the whole subject, nevertheless, to the provisions of Article X of these By-Laws.

VII.

The exercise, for the purpose of profit or gain, of any profession other than that of an Advocate, Solicitor, Barrister, Proctor, Attorney, or Counsel-at-law, and the exercise of any trade or

other industry are hereby declared to be incompatible with the dignity and honor of the legal profession; and any member of the Bar of this Province who shall exercise any such other profession for profit or gain, or any trade or other industry, either directly or indirectly, either alone or in partnership with others, or in the name of another, shall be liable to punishment as set forth in said section 25, cap. 27, 44 and 45 Vic., the whole subject, nevertheless, to the provisions of Article X of these By Laws.

VIII.

The holding of any office as a means of obtaining a livelihood, or for purposes of profit, gain or emolument,—other than those specially excepted in the following article—is hereby declared to be incompatible with the dignity and honor of the legal profession; and any member who shall be convicted of holding any office other than those excepted as aforesaid, or of voluntarily performing or voluntarily assisting in the performance of any act, service or duty of a holder of an office, or of any public officer or functionary—other than those excepted as aforesaid—shall be liable to punishment as set forth in said section 25, cap. 27, the whole subject, nevertheless, to the provisions of Article X of these By-Laws.

IX.

Notwithstanding the provisions of the four preceding articles, any member of the legal profession shall be permitted to hold any office in the Privy Council of the Dominion of Canada, or the Executive of any one of the Provinces, or the office of Professor of Law, the office of Registrar of the Vice-Admiralty Court, any office, such as a Commissioner, created for a special temporary purpose by the Privy Council of Canada, the Executive Council of any of the Provinces, any Legislature, any Municipal Council, or any corporate body, or any office in any scientific or literary society, or the office of President or Director in any corporate body: and any member of the Bar is hereby permitted to act as an arbitrator.

X.

In all cases, the Council of any Section before whom a complaint against a member is tried, as well as the General Council sitting in Appeal from the decision of a Council of a Section, shall always have the right to exercise its own discretion as to the gravity of the act

under the particular circumstances proven, and to decide, if they shall see fit, that the circumstances proven have or have not been derogatory to the honor and dignity of the profession, or such as rendered the act excusable.

XI.

Any member of the Bar who considers himself injured, or that his honor be compromised by an act of authority, shall have the right to bring a complaint before the Council of his Section, and submit to them the examination of his conduct and acts, and obtain their decision upon the same.

XII.

On the trial of any complaint against a member of the Bar, the party accused shall have the right to offer his own testimony, if he shall deem necessary.

PROCEEDINGS UPON ACCUSATIONS BEFORE COUNCILS OF SECTIONS.

XIII.

All complaints against any member of the Corporation shall be in writing, signed by the complainant, and shall set out the time, place and circumstances thereof explicitly, and in as summary a manner as may be consistent with the distinct enunciation of the charge preferred.

XIV.

The expenses of all accusations shall be borne, in the first instance, by the party making the charge; but the Council shall, on the determination of the case, decide who shall pay the costs, and settle the amount of such costs in its judgment.

XV.

It shall be especially the duty of the *Syndic* to see that all the proceedings of the Council, respecting accusations, be regular as to form.

XVI.

The Secretary of the Section shall transmit to the Secretary-Treasurer of the General Council, within three days after he shall have received notice of the deposit required by Section 78, of Cap. 27, the record of the cause in which the said judgment has been rendered, including all the proceedings and the evidence adduced on both sides respecting the accusation, and all the papers produced either in support of the accusation, or for the defence.

XVII.

The complainant, the accused, and the Council of the Section which rendered the

judgment appealed from (the latter if it think proper), shall prepare a written statement (or *factum*) of the case, ten copies of which each of them shall transmit to the Secretary-Treasurer eight days at least before the hearing.

XVIII.

The Secretary-Treasurer shall keep a Special Register in which shall be registered all appeals, and all proceedings on them in the order of their date, and each appeal shall be proceeded with in its turn according to its place on the roll.

XIX.

The Council of the Section which rendered the judgment appealed from shall be represented by the *Syndic*, if it thinks fit to prosecute the said appeal, and to be heard before the General Council.

XX.

The Appellant as well as the Respondent may be heard either in person or by attorney.

XXI.

In no appeal shall more than two Counsel be heard in opening the case or in answer, and only one shall be heard in reply

ROLL AND CHANGES IN THE ROLL.

XXII.

The Secretaries of the Councils of Sections shall be bound, whenever required so to do by the Secretary-Treasurer, to transmit to the General Council a correct roll of the members of their respective Sections, which roll shall contain the name, christian name, residence and date of commission, of all the members of the said respective Sections, indicating whether such members are practising, or whether they have notified the Section that they have temporarily ceased to practice, or whether they have been suspended, and for what cause.

XXIII.

The Secretaries of the Councils of Sections are bound to notify the Secretary-Treasurer forthwith of the death of any member of the Section, of all notifications received from members temporarily ceasing to practice, or declaring that they resume practice, and also of suspensions, either temporary or permanent, and to specify whether such suspension has been pronounced by law, or by sentence of the Council of the Section.

TRADE MARK.

In a recent case in our Courts, there was a question whether a horse's head could be readily

distinguished from the head of a unicorn, (*Darling v. Barsalou*, 4 L. N., p. 37). A question somewhat similar arose in *Read v. Richardson*, 45 L. T. (N. S.) 54, in respect of the heads of a bull-dog and a terrier.

In this case the plaintiffs and the defendants were bottlers of beer for export. The plaintiffs' label consisted of a bull-dog's head on a black ground surrounded by a circular band on which were the words "Read Brothers, London. The Bull-dog Bottling." The defendants' label represented a rough terrier's head on a black ground surrounded by a red circular band on which were the words "Celebrated Terrier Bottling, E. Richardson." The plaintiffs' beer was well known in the colonies as the "Dog's-Head" beer, and they alleged that the defendants, by exporting to certain colonies beer with the terrier's head label, led to their beer being substituted and taken for the plaintiffs' beer. *Held* (reversing the decision of Jessel, M. R.), that the plaintiffs were entitled to an *interim* injunction restraining the continuance of the terrier's head on the label on the bottles of beer exported to such colonies by the defendants. Jessel, M. R., had observed below: "I should certainly never have taken one of these dogs' heads for the other, and I do not think anybody else would. With the exception of the one witness I have mentioned, nobody says he would. It is a very different animal. Of course they are both dogs and dogs' heads, but I think there the resemblance stops. They are differently coloured, one is yellow and white and the other is brown and tan. They are a very different kind of dog, remarkably different. This bull-dog's head is a most emphatic bull-dog's head, whereas the terrier is a remarkably mild species of terrier, and by no means so acute as a terrier generally is. They are very different animals indeed; in fact, the terrier looks something like a cat. It is a very mild specimen. The dogs, too, have different collars on. I do not think that ordinary people who cannot read, who are generally pretty observant, would take one of these for the other."

It appears, however, that on the appeal, the appellants relied chiefly on the fact that the beer was known to the colonists as "Dog's Head," without any distinction of canine breed, and this was supposed to give the bull-dog beer a quasi-monopoly of beer-labels bearing a dog's head. The logic of the decision is not quite convincing

CONTRIBUTORY NEGLIGENCE IN MALPRACTICE.

The case of *Potter v. Warner*, 91 Penn. St. 362; S. C., 36 Am. Rep. 668, is of especial interest to physicians. It is there held that the measure of skill which a physician is bound to exercise is not affected by his refusal of the proffer of assistance from other physicians; and that if a patient contributes to present sufferings and permanent injury, attributed to malpractice of a physician, by disregard of his instructions, either personally or by those in charge of the patient, there can be no recovery in damages.

On the first point the court said: "Having assumed the charge of the boy Warner, the measure of professional skill which the plaintiff in error was bound to exercise did not depend on whether or not he refused the proffered assistance of other medical men. His refusal was no more than an implied declaration of his ability to treat the case properly. By assuming and continuing the charge of the patient, he was under an obligation to exercise a degree of skill which was neither increased nor diminished by such refusal." This doctrine will prove a gratification to the sensitive jealousy of the medical profession. It would be hard on the doctors to charge them with negligence in failing to call in a hated rival.

On the other point the court said: "The court, however, said to the jury, 'the doctrine of contributory negligence, if it is properly applied to this case, does not control it. The defendant is charged with unskillfulness and negligence in his professional treatment of the plaintiff. If he was guilty of unskillfulness or negligence which directly caused any injury to the plaintiff, he is responsible for such injury to the plaintiff; but of course he is not responsible for any injury resulting from any other cause. For instance, the permanent deformity of the limb may have resulted from the fault of the boy or his parents, for which the defendant could not be responsible; yet if the boy suffered unnecessary pain or a protracted illness from the fault of the defendant he would be responsible for that.' The learned judge failed to give due legal effect to contributory negligence of the defendant in error. It is true the plaintiff in error was charged with negligence and unskillfulness. Although

guilty thereof, yet it did not necessarily follow that he was liable in damages therefor. If the contributory negligence of the defendant in error united in producing the injuries complained of, he was not so liable. This rule applies to the unnecessary pain and protracted illness as well as to the permanent deformity of the limb. The evidence is amply sufficient to submit to the jury the question of contributory negligence on the part of the defendant in error. If they find the parents of the boy were in charge of and nursed him during his sickness, and that they did not obey the directions of the plaintiff in error in regard to the treatment and care of their son during such time, but disregarded the same and thereby contributed to the several injuries of which he complains, he cannot recover therefor. If the injuries were the result of mutual and concurring negligence of the parties, no action to recover damages therefor will lie. A person cannot recover from another for consequences attributable in part to his own wrong."

The editor of the American Reports appends the following note to this case: "In *Hibbard v. Thompson*, 109 Mass. 286, it was held that a patient cannot recover, either in contract or in tort for injuries consequent upon unskillful or negligent treatment by his physician, if his own negligence directly contributed to them to an extent which cannot be distinguished and separated. The court said, the instructions 'seem to us to contain a careful and accurate discrimination between the different aspects of the case as the jury might find the facts to be.' They were first instructed that 'if it be impossible to separate the injury occasioned by the neglect of the plaintiff from that occasioned by the neglect of the defendant the plaintiff cannot recover;' but the judge added: 'If however they can be separated, for such injury as the plaintiff may show thus proceeded solely from the want of ordinary skill or ordinary care of the defendant he may recover.' The first part states the ordinary rule as to the negligence of the plaintiff; the second states the proper limitation of the rule. It is an important limitation, for a physician may be called to prescribe for cases which originated in the carelessness of the patient, and though such carelessness would remotely contribute to the injury sued for, it would not relieve the physician from liability

for his distinct negligence and the separate injury occasioned thereby. The patient may also, while he is under treatment, injure himself by his own carelessness; yet he may recover of the physician if he carelessly or unskillfully treats him afterward, and thus does him a distinct injury. In such cases the plaintiff's fault does not directly contribute to produce the injury sued for.'

"In *Geisselman v. Scott*, 25 Ohio St. 86, it was held that if the patient neglects to obey the reasonable instructions of the surgeon, and thereby contributes to the injury complained of, he cannot recover for such injury; but the information given by a surgeon to his patient concerning the nature of his malady is a circumstance that should be considered in determining whether the patient in disobeying the instructions of the surgeon was guilty of contributory negligence or not.

"In *McCandless v. McWha*, 22 Penn. St. 261, Woodward, J., said: 'Nothing can be more clear than that it is the duty of the patient to co-operate with his professional adviser, and to conform to the necessary prescriptions; but if he will not, or under the pressure of pain cannot, his neglect is his own wrong or misfortune, for which he has no right to hold his surgeon responsible. No man can take advantage of his own wrong or charge his misfortunes to the account of another.'

"If the patient is insane, and so incapable of co-operating with the physician, contributory negligence is not imputable. *People v. New York Hospital*, 3 Abb. N. C. 229. And this inability the physician is bound to take into account.

"If the physician has injured the patient by his negligence, the refusal of the patient or his custodians to allow an experiment by another physician to repair the injury, is not contributory negligence unless they had reasonable assurance of the success of the experiment. *Chamberlin v. Morgan*, 68 Penn. St. 168. The court said: 'Is it the duty of a person who has been injured by the malpractice of a physician or surgeon to make any experiment which may be suggested to him, however plausible it may appear? A man who is not himself a physician, and cannot be expected to know any thing upon the subject, cannot be himself a judge of such matters. It is very reasonable for the father of Hattie

Morgan to say when Dr. Richardson proposed to put her under the influence of an anæsthetic and attempt to reduce the limb, 'that so long as she was improving so fast as she had done since he came home, he should not have it disturbed.' Had Dr. Chamberlin proposed this experiment there might be some reason to hold that he should have the opportunity of redeeming his mistake, or even if he had called in Dr. Richardson to act on his behalf. Mr. Morgan merely called in Dr. Richardson to examine his daughter's arm and give his opinion about it. That did not oblige him to adopt his advice, or to incur the hazard and expense of another operation. He owed no such duty to Dr. Chamberlin. It was offered to prove that the injury could then have been reduced. But how was Mr. Morgan or Hattie to have known this? Had the experiment failed, it might well have been urged that as she was improving she ought to have been let alone, and that Dr. Chamberlin was relieved from all responsibility by the case having been taken out of his hands."—*Albany Law Journal*.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, NOV. 15, 1881.

DORION, C. J., MONK, CROSS, BABY, J. J.

LOW V. THE MONTREAL TELEGRAPH COMPANY *et al.*

Pleading—Rejection of plea on motion.

Leave will be granted to appeal from an interlocutory judgment dismissing upon motion a demurrer and a special plea filed by the defendants.

The action was instituted by the plaintiff as a shareholder in the Montreal Telegraph Company, to set aside an agreement entered into between that Company and the Great North Western Telegraph Company, as being *ultra vires*; to restrain the Montreal Telegraph Company from acting further upon it; and to compel the Great North Western Telegraph Company to render to the Montreal Telegraph Company an account of all it had received under the provisions of the agreement.

The defendants demurred to the action upon the ground, amongst others, that the conclusions taken by the plaintiff were conclusions such as could not by law be taken in an ordinary suit or action by one shareholder in a cor-

poration. That such conclusions could only be taken in proceedings under the Act respecting injunctions, or by a public officer under the provisions of the law respecting the remedies against corporations for acts in excess or abuse of their franchises.

The defendants alleged substantially the same grounds of defence by a plea, *exception péremptoire en droit*.

The plaintiff moved to reject the demurrer and plea upon the ground that the matters therein set forth ought to have been pleaded by an *exception à la forme*.

The Superior Court granted the plaintiff's motion, on the ground stated, and rejected the demurrer and plea from the record.

Abbott, Tait & Abbotts for defendants, moved for leave to appeal from this judgment, contending, amongst other things, that the grounds of the demurrer and plea were properly the subject matter of plea to the merits, as they put in issue plaintiff's *right of action*, and that the sufficiency of those pleas could not be tried by motion.

MacLaren & Leet, for plaintiff, contended that the pleas attacked the quality of the plaintiff, and therefore an *exception à la forme* was the proper pleading. And that as the subject matter of an *exception à la forme* was irregularly introduced into the record, by styling it a demurrer and a plea to the merits, after the time at which the exception ought to have been filed, the proper proceeding to get rid of the irregularity was by motion.

The Court allowed the appeal, mainly on the ground that the sufficiency of pleas to the merits could not be tested on a motion to reject them; and that the Court below should have rejected the plaintiff's motion, leaving the merits of the plea to be tried in the usual way after joinder of issue.

Appeal allowed.

MacLaren & Leet for plaintiff.

Abbott, Tait & Abbotts for defendants.

COURT OF REVIEW.

MONTREAL, Oct. 31, 1881.

[From S. C., St. Hyacinthe.

JOHNSON, MACKAY, RAINVILLE, JJ.

MICLETTE V. LE MAIRE, ETC., DE LA VILLE DE ST. HYACINTHE.

Lease of Stall—Failure to pay license fee—Lessor's right of re-entry.

The defendants, the City of St. Hyacinthe, leased to the plaintiff for two years and nine months from the 1st of February, 1877, the butchers' stalls or *étal double*, Nos. 28 and 29, in the central market of the city. The rent was \$70, payable in advance on or before the 15th October annually, the first rent apparently for the nine months was to be paid at the passing of the lease, for it is dated the 3rd of February, and makes the first payment of rent to be payable on the first of February *courant*. The lease stipulated that the lessee was not to sublet, nor to permit anybody but himself to occupy the stalls, that he was to conform to all the *règlements* then in force or afterwards to be made concerning the markets, that if the rent was not punctually paid, the city might either sue for payment or might retake the stalls (*les reprendre*), and finally the city might, at any time "*s'emparer du dit étal ou b'inc, sans être tenu de payer aucune indemnité quelconque, dans le cas de contre-vention de la part du preneur à aucune des clauses du présent bail et des règlements des marchés.*" On the 15th October, 1878, the plaintiff paid his rent, \$70, up to the 1st November, 1879.

MACKAY, J. On the 27th September, 1879, the plaintiff protested the defendants, because of two policemen, or clerks of markets, employees of defendants, having on the 16th June, by malice and without cause taken possession of plaintiff's stalls 28 and 29, locking them up, and preventing plaintiff carrying on his business. The plaintiff, following his protest, has sued the defendants for \$526.25. The \$26.25 is a sum equal to the rent from 16th June to 1st November, 1879, paid October, 1878, in the \$70 paid in advance that day. The \$500 are damages for the alleged causeless and illegal dispossession of the plaintiff.

The defendants' first plea is that plaintiff had sublet the stalls in May and June, 1879, and suffered other persons to occupy; that by a *règlement* of 1877 all persons in St. Hyacinthe are prohibited from exercising the occupation of butchers unless upon payment to defendants before the 1st of May each year, of \$5. That before 1st May, 1879, the plaintiff had permitted a third person unlicensed to carry on the trade of butcher in the stalls against the will of the

defendants and their *réglements*, and in violation of the lease. That the plaintiff had failed to take a license as a butcher from 1st May, 1879, and in June, date of his expulsion, alleged, was still in default, against the provisions of the defendants' *réglements* and their lease to plaintiff. That the dispossession complained of was lawful, under the circumstances, and the plaintiff is entitled to no damages nor indemnity; particularly as the defendants have been under impossibility to lease the stalls for the time between the 16th June and 1st November, 1879.

In June last judgment went against the plaintiff, the Court finding proved in favor of the defendants the substance of their pleas, that the plaintiff had not paid his license fee of \$5 before 1st May, 1879, or since; also, that he had permitted a butcher named Lachapelle to occupy the stalls in 1879, who had been selling there for his own account, the plaintiff was continuing in default, and the defendants were justified in retaking possession in June, as they did.

One question before us is this: Had the plaintiff made violation or violations of his lease before the 16th of June? It is to be observed that under the *réglement* of 1877 the plaintiff was bound not to carry on any trade as butcher in St. Hyacinthe after the 1st of May, 1879, without a license, under penalty of \$20, or imprisonment for a term not exceeding two months. Plaintiff had incurred this penalty over and over again, before the 16th of June. He took no license, and acting without one, violated his lease conditions. It has been argued for him that the license fee had never been demanded. The lessors needed not demand it, seeing the character of the *réglement* of 1877 and its requisitions; to all of which the plaintiff, under his lease, has submitted himself. It has been said that this claim—that the plaintiff had forfeited his lease from not having paid his license fee—is an afterthought; but whether so or not, it is competent to the defendants, against an action of damages, to make it. Actions for damages must be well founded. The plaintiff claims from not having been able to carry on business in his stalls, as he had right to; that is his claim. But query as to his right to carry on without a license from the defendants, for he was violating a *réglement*, and incurred a penalty for each day that he carried on without license. His case has a weak side,

seeing that, and that his lease (in words, at any rate), allowed defendants to *s'emparer du banc* in certain cases, as I have read at the commencement of this judgment. We do not now, since the enactment of our Civil Code, so easily hold penal clauses to be merely comminatory as formerly. (See what was said in the Pew case, even before the Civil Code, 5 L. C. R. 3.) Upon the question of whether or not plaintiff had also violated his lease, by permitting a butcher named Lachapelle to occupy the stalls, who had been selling in them for his own account, we do not feel strong enough to go against the finding of the Court below. Even if we did, the plaintiff would not gain his case, seeing our finding on the other part of it, upon which the judges here are unanimous.

There is forced upon us another question, namely: "Supposing that plaintiff did violate his lease conditions, was the course taken by the defendants lawful?" According to the plaintiff's argument the defendants had to sue in ejectment, and had no right to retake possession as they did. To this the defendants say: "Look at the lease, it stipulates for the right of re-entry as here, and without indemnity." The defendant argues that as in the case of a pew in a church held under lease, it is held that a clause stipulating that in default of payment of the rent at the time fixed, the lease shall cease from the moment of the default, and the lessor shall have the right to lease to another, without other formality, must be allowed force, and not be held as merely comminatory, so in the case of a stall in a market held under a lease such as the plaintiff and defendant settled between them. We do not see that the Judge in the Court below agreed to this in words, but he seems to have held the substance of it, to wit that the defendants were justifiable in retaking the stalls as they did. The plaintiff was dispossessed without violence to his person, or to any person. Nobody was in the stalls when they were taken possession of. They were stalls in a building property of the defendants, opened and shut when and as they ordered. Singly the stalls were of small value, yet the revenues of the market were considerable, and it was important that they should be collectable easily, and that leases of them should contain the most stringent clauses to provide for speedy payments. How could the

affairs of the market be administered under a system of expensive and tedious suits at law having to be against butchers, perhaps worth nothing, holding over and refusing to pay rent. We find that the defendants needed not resort to action *en réiliation de bail*. We also find, as regards the \$26.25, that the defendants are not liable to indemnify the plaintiff. We confirm the judgment appealed from in its *dispositif* with costs against plaintiff.

Tellier & Co. for plaintiff.

R. E. Fontaine for defendants.

RECENT DECISIONS AT QUEBEC.

Procedure.—When an action is returned during the long vacation, the 1st of September is not to be deemed the return day under art. 463 C.C.P., but is the first of the four days allowed by art. 107 for filing preliminary pleas.—*Beausoleil v. Méthot*, 7 Q.L.R. 257.

License Act—Information—Conviction.—Jugé (1), que "La loi des licences de Québec, de 1878," ne limite que par le montant réclamé la juridiction qu'elle donne au juge des sessions pour la poursuite de contraventions à ses dispositions, et qu'en vertu de cette loi, aussi bien que du droit commun, plusieurs offenses distinctes peuvent être poursuivies par une seule plainte et comprises dans une seule conviction.

(2) Que l'énonciation dans la plainte de ventes, au même temps et au même lieu, de neuf différentes espèces de boissons n'est que l'allégation d'une seule vente, et que, y fut-il allégué plusieurs ventes distinctes, la demande de la condamnation à une seule pénalité n'excédant pas \$100 conserverait sa juridiction au juge des sessions.—*Côté v. Chauveau et al.*, 7 Q.L.R. 258.

Attorney—Désaveu.—An attorney who appeared in a case, for a defendant upon whom process had not been regularly served, and who denies that he employed such attorney, is bound to show that he was authorized to appear, before he can recover costs. *Désaveu* in such case is not necessary.—*Fellon v. Asbestos Packing Co.*, 7 Q.L.R. 265.

Trade—Agreement not to carry on business.—Jugé (1), que la convention, dans l'intérêt du commerce d'un autre, de n'en pas faire un à son compte, n'empêche pas de se mêler de celui d'un tiers et de l'aider et favoriser; qu'elle est une limite à la liberté individuelle qui ne peut

pas s'étendre au-delà des termes de la stipulation, et qu'elle diffère essentiellement de la vente d'un fonds de commerce ou d'un achalandage qui, comportant garantie d'éviction et de trouble, ne permettrait pas au vendeur de faire le même commerce ou de se mêler de celui de même espèce que ferait un tiers. (2) Que l'obligation de tirer sur le stipulant les bons que l'obligé pourra consentir ne peut pas être invoquée par la société qu'a subéquentement formée le premier, ni même par lui s'il ne peut pas les honorer autrement qu'avec les biens de la société.—*Bertrand v. Julien*, 7 Q.L.R. 268.

River—Dam—Indemnity—Prescription.—Jugé (1), que le statut, qui permet l'exploitation des cours d'eau en y construisant des écluses, crée une servitude légale sur les terres sur lesquelles ces écluses font refluer les eaux. (2). Que la prescription de deux ans ne peut pas être opposé à la demande de l'indemnité. (3). Que cette demande doit être poursuivie devant les tribunaux ordinaires, que l'expertise mentionnée dans le statut n'est possible que du consentement des deux parties, et qu'elle n'a aucune autorité judiciaire. (4). Que l'indemnité, étant le prix de la servitude, est due par celui qui l'a exercée, et que la vente subséquente du moulin et des écluses ne décharge pas celui qui les a construits de l'obligation de la payer.—*Breakay v. Carter et al.*, 7 Q. L. R. 286.

GENERAL NOTES.

THE London Law Times of October 29th says:—"Two familiar faces will be missed by the Bar on the opening of the Courts—the faces of men not kept from their work by ill-health, but removed by death. Mr. Joshua Williams, Q.C., one of the most remarkable real property lawyers of the present century, and Mr. Clarkson, Q.C., the most accomplished admiralty lawyer of his day, are dead—the former at the age of sixty-eight, the latter in the prime of manhood."

LITTELL'S LIVING AGE FOR 1882—This widely-known weekly magazine has been published for nearly forty years, and during that long period has been prized by its numerous readers as an excellent compendium of the best thought and literary work of the time. As periodicals become more numerous, this one becomes more valuable, as it presents a judicious selection of the best periodical literature of the world. It fills the place of many quarterlies, monthlies and weeklies, and its readers can, through its pages, easily and economically keep pace with the work of the foremost writers and thinkers in all departments of literature, science, politics and art. Its prospectus is well worth attention in selecting one's periodicals for the new year. Littell & Co., Boston, are the publishers.

The Legal News.

VOL. IV. DECEMBER 3, 1881. No. 49.

INSURANCE LEGISLATION.

The appeals to the Judicial Committee of the Privy Council in the cases of *Parsons v. The Citizens Insurance Co.*, and *Parsons v. The Queen Ins. Co.*, (3 Legal News, 326) were, on the 26th November, allowed without costs, and the judgments in both cases reversed. The information transmitted by cable with reference to this important decision is meagre, but it is known that the judgment proceeded on the ground that the statutory conditions were presumed to be part of the contract in each case, although not printed in the policy; and that the Canadian Courts had misinterpreted the law. The Judicial Committee held, however, that the Act of the Provincial legislature was within the power of that body to pass.

CONTRIBUTORY NEGLIGENCE.

A singular case of contributory negligence—*Allan v. Mullin*, recently decided by the Superior Court, is reported in the present issue. A valuable stallion, while being shod in a smithy, sustained a horrible injury, and had to be destroyed. The accident would not have happened if the floor of the smithy had not been defective. But on the other hand, what immediately conduced to the accident was the imprudence of the owner's groom who accompanied the animal, and who caused him to start violently by striking him with a whip. The court held that there was contributory fault, and the blacksmith was freed from liability.

NEW BOOKS.

THE MUNICIPAL CODE OF THE PROVINCE OF QUEBEC,
by E. Lef. de Bellefeuille, Esq. Montreal:
E. Senecal & fils.

A French edition of this work was published some two years ago, and is well known to the profession. The Municipal Code, as the Judges have repeatedly declared, is a most intricate and, at times, incomprehensible piece of legislation, and needs all the light that can be thrown upon it by commentators. Few are more qualified for

the task than Mr. de Bellefeuille. In this edition are comprised, together with the Municipal Code, the Quebec License Act, and the first part of the Quebec Election Act, with all the amendments made thereto up to and during the last session of the legislature. The decisions of the Courts are also cited. The latter are less numerous than might be expected, but under our system the judgments of the judges of country districts are seldom if ever reported, and many decisions are no doubt left in the limbo of obscurity from which they have never emerged. Mr. De Bellefeuille has done his best to fill the void, and we cordially commend his work to the attention of our English-speaking readers.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, NOV. 26, 1881.

Before MACKAY, J.

BERNARD v. GAUDRY *et al.*

Non-registration of partnership—Defendants sued jointly and severally for one penalty.

An action will not lie against two defendants jointly and severally for one penalty, for non-registration of partnership.

PER CURIAM. The action was instituted against the two defendants as partners in Montreal, and is a *qui tam* action for \$200 against the defendants jointly and severally, for not having duly registered their partnership.

The defendants pleaded by exception *à la forme* that this prosecution of two defendants for one penalty of \$200 could not be allowed, as each wrong-doer had to be sued in such cases for his own misconduct, and for \$200. Some other matters were pleaded of no importance now. After that there were two motions to amend, one by plaintiff and one by defendant and these have been granted. The exception *à la forme* having been dismissed, the defendants pleaded to the merits, that the defendants could not be sued jointly and severally for one penalty; that the penalty has been enacted against each wrong-doer for \$200 single penalty; that plaintiff's affidavit before suit is not such an one as the law has appointed for *qui tam* prosecutors; 27-28 Vic., c. 43. (It turns out that the word "dit" ought to have been repeated in

plaintiff's affidavit.) Then there is a plea that defendants had really no intention to transgress the law, and that they had registered their partnership, but by ignorance one of the registrations called for was at a wrong registry office: that they corrected this as soon as possible and have now perfectly registered, and there is a plea of general issue.

Before these pleas were filed, the plaintiff had filed a *désistement* as against one of the defendants, saving his demand as regards the other. Yet afterwards, on 5th March, he joined issue with both defendants, and the case is now submitted after *enquête*. I am of opinion that the defendants are right in their proposition that such an action as this, for a single \$200 penalty against two wrong-doers, each of whom has to answer only for himself, and each of whom has incurred a penalty of \$200, is bad. See *Espinasse* (Penal actions). Action dismissed.

Painchaud, for plaintiff.

St. Pierre & Scallon, for defendants.

SUPERIOR COURT.

MONTREAL, NOV. 26, 1881.

Before MACKAY, J.

HENRY D. J. LANE v. TAYLOR *et al.*

Will—Legacy—Error in name of legatee.

An error in the name of the legatee does not annul the disposition of the will by which the legacy is bequeathed, when the person intended to be benefited is indicated beyond reasonable doubt.

PER CURIAM. The defendants are sued as executors and trustees under the will of the late Miss Lane for £250 currency. The declaration sets forth a clause of her will by which she gave and bequeathed unto her cousin, George Henry Lane, of Ottawa, £250 currency, and states that this meant himself, the plaintiff; for testatrix knew well that George Henry had died several years before the date of the will, and is in fact described as dead in a later part of the will gratifying his daughters; the plaintiff was the only male cousin at Ottawa that the testatrix had, she knew him to be Henry, and must have assumed him to bear his father's name, George Henry.

The plea is that no legacy has been made to the plaintiff, that he is not the person designated, and that Miss Lane had frequently said

that she would leave plaintiff nothing.

The testatrix's will is of 19th June, 1878, it is full of noble charities, and names as universal residuary legatee, Catherine Ann Tubby, who is otherwise a legatee. The will shows perfect intelligence. The testatrix names a living cousin, George Henry Lane, of Ottawa, and twice names a dead George Henry Lane, of Ottawa, when referring to his daughters as her cousins. This George Henry was plaintiff's father. Some time before her death the testatrix entrusted Miss Tubby to give the plaintiff the family portrait of the testatrix's grandfather. Miss Tubby does not seek to favor the plaintiff, yet, asked the question: "If plaintiff's father was not meant, can you suggest any one that could have been meant if the plaintiff was not?" answers: "I cannot."

Considering all that is proved, I find that Miss Lane fell into an error in designating the plaintiff to have £250. She misnamed him. He was and is Henry, and his father was before him. The testatrix knew both by that name. No other male Lane, cousin of testatrix, was in Ottawa at the date of the will. Here is our law on misnomers in wills:—"Si l'erreur ne tombe que sur le nom ou sur le surnom du légataire, la disposition n'est pas annulée, pourvu qu'il conste de la personne, par quelque démonstration qui le fasse connaître sans équivoque." Furgole, vol. 1, Testaments, p. 235. Pothier: Dons. Test. is to the same effect. So I pronounce judgment for the plaintiff.

Barnard, Beauchamp & Creighton, for plaintiff.
Ritchie & Ritchie, for defendants.

SUPERIOR COURT.

MONTREAL, NOV. 26, 1881.

Before MACKAY, J.

THE CITY OF MONTREAL, petitioning for the sale of a land for arrears of assessments, and LOIGNON, claimant, petitioner.

Petition under the C. C. P. 900—Diligence required to ascertain owner.

A petition under Art. 900 C. C. P. cannot be presented to a judge in chambers.

The creditor's hypothecary recourse under the above article can only be exercised where the proprietorship remains uncertain after due diligence has been used to ascertain the owner.

PER CURIAM. Article 900 of the Code of Pro-

cedure allows proceedings in favor of mortgage creditors against lands, the proprietors of which, are uncertain or unknown. We have had that law for over 25 years. The corporation commenced proceedings under it on the 19th July, 1880, having a privilege for some arrears of assessments due by the proprietor of lot No. 593 of St. Ann's Ward, whoever he might be. They commenced by a petition that they had in good faith made enquiry and diligence to find out the owner's name, and this is sworn to. The Corporation has actually sold the land by a *décree*.

Now, Loignon comes in and claims the land, and says that he has always been the known owner of it, and so named in the *Livre de renvoi*, part of the cadastral plan of St. Ann's Ward, that the city had no right to the benefit of the Art. 900, and asks that all their proceedings be set aside, including the seizure and sale. In his petition he sets out his title. The trouble has arisen from the city's want of sufficient enquiries, and from the claimant's land having always been one vast lot; all that has happened to make it three is that the surveyors for the cadastre made three of it, but preserving in the *Livre de renvoi* the name of Loignon as the owner of all three. The city might have seen that all the time. Lawrence Barnes never was owner of it. The petitioner Loignon seems an exact enough man. What do half the people in Montreal know about all the lines that cadastral and other operators have drawn across their properties, on certain plans? Loignon has always been charged by the Corporation for what he supposed was his land there, now called by three numbers. He was never told that he was not paying enough, and what he did pay might fairly enough be taken by him to be the assessments on the whole land, for the amount has swelled to be larger, per annum, than it was before the cadastral plan was made.

The city pleads that all its proceedings have been formal, and that Loignon's allegations are untrue.

I find that Loignon's case is good, and I must grant his petition. The very first proceeding of the city is a nullity. The Art. 900 of the Code de Procedure does not allow to a Judge in the long vacation or in Chambers to entertain that first proceeding (*requête*). If a Judge in Chambers can grant such a *requête* there is no other proceeding or order, specially appointed for the

"Superior Court" to take or make, that he may not as well take or make. The *décree* is a nullity, the very first proceeding being irregular, and apart from this, Loignon having proved enough.

Pagnuelo & Co., for petitioner.

Roy, Q. C., for the City.

SUPERIOR COURT.

MONTREAL, NOV. 30, 1881.

Before JOHNSON, J.

ALLAN V. MULLIN.

Damages—Farrier—Safe condition of premises—Contributory negligence.

A person carrying on a trade on his premises is bound to have the premises in a safe condition for persons and property coming there by implied invitation to give him their custom.

But although there may have been fault amounting to ordinary negligence on the part of such tradesman, he may relieve himself from damages caused by an accident, by showing that there was contributory fault on the other side, without which the accident would not have occurred; and therefore where a valuable horse received an injury while being shod by a farrier, and it appeared that the accident was caused by the groom who accompanied the animal, striking him with a whip, the farrier was relieved from liability, notwithstanding the unsafe condition of the floor of his smithy, but for which no damage to the horse would have resulted.

JOHNSON, J. The present action is to recover the value of a horse owned by the plaintiff, and which was so badly injured while being shod in the premises of the defendant, who is a farrier, and, as is further alleged, by his fault and negligence in respect of the bad condition of the floor of the smithy, that it had to be destroyed.

The answer made to the action by the defendant is that the horse was all the time in the exclusive charge of the plaintiff's groom, who needlessly struck it with a whip, and so caused the accident. That the floor was in good condition, and there was no fault on the defendant's part. That after the accident the plaintiff ought to have given over the horse to the defendant, instead of which he kept it, and destroyed it unnecessarily and on his own respon-

sibility, the injury being curable, and not detracting much from the value of the horse, which was denied to be worth \$1,000 as claimed by the plaintiff.

The case was tried before me on the 12th instant, and the evidence disclosed the following facts:—The plaintiff owned a valuable and spirited stallion, which he imported from the United States in April last. On the night of the animal's arrival here, it was taken to the defendant's place (he being the farrier usually employed by Mr. Allan) to be shod, and the defendant was then told that the horse was nervous and rather difficult to shoe. A month or two later, on the 15th of June, the horse was sent again to the same farrier to be shod. It was led into the forge by Crosby, the groom, who was in charge of it, and who held it by the head while being shod; and while the smith had one of its fore feet on his knee, and was in the act of rasping the hoof, the horse reared, whereupon the groom struck him twice with a whip, the strokes, or one of them, causing the animal to spring or swerve suddenly back towards the wall. This wall was made of boards; and instead of the planks of the floor joining closely with the wall, there was an opening between the end of one of them and the bottom board of the wall. This opening was of uncertain width (the evidence making it vary from one and a half to four inches.) The point of the horse's off hind foot must have got into this opening, and the weight of the animal's tread or kick forced or bent back the board in the wall, so as to let the foot in completely, and then the board sprang back again to its old place, and held the foot so firmly round the coronet that a sudden tug of the leg actually pulled the bone of the foot out of the hoof, which, held as in a vice, remained behind with part of the broken bone sticking to it. Mr. Alloway, who had the superintendence of Mr. Allan's stud, got notice of what had happened, and came down immediately, but found the injury so serious that, acting on his own judgment (being a veterinary surgeon), and with his employer's leave, he destroyed the horse. As to the necessity for this step, there is a conflict in the evidence; but the weight of it is to show that a partial cure of the local injury might have been effected, but would not have been worth the cost, as the hoof in its natural form could never

have been reproduced, and the animal, even if it survived, could only have been a shocking sight, and a useless cripple. It is also proved that sometime after the accident, the defendant, speaking to Mr. Alloway, asked him if the matter could not be arranged with the plaintiff, and offered, in the event of a settlement, to shoe Alloway's horses for nothing as long as he lived. The defendant also spoke of the condition of the floor, and said he would have it put right, but not just then, as it would look bad, and the floor, was, in fact, repaired shortly afterwards.

Upon this state of facts, the questions presented would be:—1st. Supposing there is nothing on the plaintiff's side conducive to the accident, what would be the extent of the defendant's responsibility of itself, and also considered with reference to the warning given in April that the horse was difficult to shoe? 2nd. Have we in this case proof of any contributory fault by the plaintiff's groom who had the horse in charge? 3rd. What is the fair and proper meaning and effect upon the case of the defendant's subsequent statements to Mr. Alloway, and the repairing of the floor?

I may disembarass the case at once of everything extraneous to the principle of responsibility under the circumstances, by saying that, in my opinion, the warning, and the defendant's subsequent statements as proved ought not to affect the decision. As regards the warning in April when the horse, so to speak, was first introduced to the farrier, it seems to me that the defendant must have understood it as referring to the mode of handling the horse by the workman who might shoe him. It was the peculiarities of the horse to which attention was drawn; and the faulty condition of the floor, even if known at the time, would have been equally dangerous to any horse that might tread on that particular spot, without reference to their being unhandy to shoe. Then, the repairs to the floor of the forge, and the statements to Alloway, may safely imply, no doubt, an admission of the faulty state of the premises in that respect, an (admission probably rendered unnecessary by the other evidence); yet I think the offer to shoe the horses *gratis*, if the difficulty could be settled, can hardly be held to mean anything more than anxiety for peace, and for the retention of a valuable customer.

Therefore I think we must look at this case with reference to two points only: 1st. the *prima facie* liability of the farrier arising from the faulty condition of the premises, and 2ndly. with reference to any modification of that liability which might arise from the acts of the groom who held the horse while it was being shod.

I will not discuss authorities; none were discussed before me, and none require to be discussed; but I will merely state certain principles, which, in themselves, suffer no difficulty; and then apply them to the case in hand. 1st, I say there attaches to any person carrying on any particular trade on his premises, a distinct legal liability to have those premises in a condition of safety for the persons and property coming there by his implied invitation, to give him their custom. Without discussing this principle (and I have said there has been no discussion, and can be none upon it), I will merely state the authority for it, from the well known concise treatise of Campbell on the law of negligence. I do not of course cite an *ex professo* treatise as authority; but I rely upon the authorities there collected. At page 17 the author, after laying down that slight negligence is sufficient to infer liability, and after giving some illustrations says: "The inference seems to be that in a question with strangers being where they have right, every one is bound in exact diligence for the safe repair of his premises, and conduct of his operations, failing such safe repair of premises, or conduct of operations, *prima facie* evidence of negligence may be furnished, in case of resulting damage, by the maxim *res ipsa loquitur*." Then follows the list of authoritative decisions. Again, at page 28: "The same responsibility in regard to the safety of his premises, which a person owes to the public being in places where they have a lawful right, he owes to those who by his invitation, come upon his premises in pursuit of a matter of common interest to both." He then proceeds to distinguish cases of being on the premises by invitation of the occupier, from cases of being there by his mere license; but in both, the occupier is liable for ordinary negligence. It is also a principle underlying liability in such cases, that the negligence causing the damage should be the immediate or proximate and not the remote cause of it, (see No. 78, p. 66), and such was undoubtedly the case here.

Now, as matter of fact, I hold that the descriptive evidence, as well as the admissions after the fact, show that the spot where this thing happened, although it may not have been readily perceptible perhaps before the occurrence drew attention to it (and no one is proved to have ever seen it before), was nevertheless a dangerous spot, one where such a thing as actually happened, though probably not with the same dreadful consequences, might have happened, even though it could not readily be foreseen or apprehended, to any other horse taken there to be shod, and getting its foot caught in that place. The allowing such a thing in his forge was, in the case of the defendant, *culpa* under the Roman law. Under the French law it was *faute*; and in the English cases (the principle there being precisely the same) it would be "ordinary negligence" in the occupier, and we have seen that, as such, it would subject him to liability for resulting damage to those who come there by what the law treats as his implied invitation.

Now, as to the second question, was there contributory or conducive fault on the other side? It is a settled rule in cases of ordinary negligence that the injury must be the result of the defendant's exclusive fault in order to make him liable. If, therefore, there has been a concurring and proximate cause of this horrible accident contributed directly by the fault of the other party, he would have no case against the defendant. I must make one qualifying observation, however, for it is also settled law that the cause contributed by the act of the other party will be no answer to the action in those cases where there is either direct intention to injure, or even that very gross negligence which the law equates to intention. I will take the rule from the same treatise with the authorities, at p. 70, par. 18. "Contributory negligence of a simple or ordinary degree is no answer to injury caused by such gross neglect as the law equates to intentional mischief." And the cases are cited of a horse and cart being left alone in a public place where a child had access to them and got hurt, and it was held that *some* mischief was a natural consequence; and also the case of spring guns, it being held that trespass was no answer to the serious and intentional injury caused by such instruments.

The circumstances of the present case, however, clearly take it out of the operation of the last-mentioned rule; because it must be admitted, I think,—at least such is my appreciation of the proof—that the thing which happened here could hardly have been foreseen, even by a keen observer. I do not say that the defendant is not responsible for the defect in the floor; I say he is responsible. It was there—on his premises to which his customers were held by law to be invited by him, and no one else is responsible. *Res ipsa loquitur*—as the law says; but I say he is responsible not as for intentional mischief, but as for ordinary negligence, *i. e.* as for a thing which he might have known, and not for a thing which he must have known to be of such obvious and certain danger as is contemplated in the authorities and cases on the subject. The principle then as to the operation of contributory negligence of an ordinary and simple kind, in cases like the present where ordinary negligence is the ground of action against the defendant, is this:—"In all cases where ordinary negligence is sufficient to infer liability, it is a sufficient defence to show that there was contributory negligence on the part of the plaintiff, that is to say, to show that although the negligence of the defendant was a cause, and even the primary cause of the occurrence, yet that the occurrence would not have happened without a certain degree of blameable negligence on the part of the other." (Campbell, p. 69, paragraph 81, and cases there cited). There is, of course, in the books an infinite variety of cases presenting every conceivable condition of fact, but the rule itself is never varied. It is liable, of course, to mistaken application, but hardly in such a case as the present—and the only remaining question would seem to be: Was there contributory negligence of a simple and ordinary degree by the groom in striking the horse twice, as he is proved to have done, and not only needlessly, as one of the witnesses testifies, but, in a small space like that, imprudently, in my opinion. Of the fact itself there can be no doubt. It is proved by Crosby himself, by Drysdale, by Kinsley, and by Stohl, who, though not as near the horse as the others, is equally clear about the use of the whip. Besides this, there is the statement of the way it happened, made by Mullin himself to Swinburne, so that the use of the whip is

certain. "He had no right to strike the horse," is the language of one of the witnesses. It was imprudent to say the least, according to the best view I can take of it. The horse was powerful and spirited and admittedly nervous. The space was small, and the accident, in the way already related, was the result of the concurrent causes of the strokes of the whip, and the defect in the floor. There is nothing to lead to the belief that the accident would have happened without the blows, nor yet, of course, without the state of the floor at the spot to which the blows drove the horse. In my opinion, and I have given every attention in my power to the case, there is ordinary negligence on the part of defendant proved. There is also contributory negligence on the part of the plaintiff (for of course the maxim of *respondent superior* applies to the master and the servant here), and in such cases the action is dismissed without costs, *i. e.*, each party being in fault, each pays his own, and that is the judgment of the Court. The obligation to give over the injured horse to the party held responsible for the injury could only arise in estimating the extent of damages, and of course does not come up at all under the circumstances of this case.

L. N. Benjamin for plaintiff.

Doherty & Doherty for defendant.

SUPERIOR COURT.

MONTREAL, November, 1881.

Before PAPINEAU, J.

GREGORY V. THE CANADA IMPROVEMENT CO. *et al.*

Procedure—Enquête—Inscription.

A party to a cause may inscribe it on the roll at Enquête for the adduction of evidence without the consent of the opposite party.

Upon such an inscription a judge may name a clerk to take down the evidence, and thereupon the enquête may be proceeded with, without the consent of the opposite party, and out of the hearing of the Judge, in the manner heretofore practised at enquête by such clerk taking down the depositions of the witnesses au long.

The plaintiff inscribed this cause on the roll *d'Enquête* for the adduction of evidence in the following form:—

"We hereby inscribe this cause upon the roll *d'Enquête* for the adduction of evidence, on the "sixth day of July next, 1881."

The defendants moved to reject the inscription upon the ground that it was in effect an inscription to take the proof at length at *Enquête* sittings, and that the plaintiff could not so inscribe the case without the consent in writing of the defendants.

Tait, for the defendants, argued that the policy of recent enactments in that respect had been to restrict the old *enquête* system as much as possible, and to confine it to cases where both parties consented that the evidence should be taken in that way. He cited article 263 of the Code to the effect that in contested cases the witnesses are examined in presence of a Judge, the Judge asking them such questions as he may think proper. The Judge takes down or causes to be taken down in writing under his direction, notes of the material part of the evidence, &c. He also cited articles 284, 288 and 289, providing that upon the consent in writing of all parties to the cause, the proof may be taken down under the old *enquête* system; prescribing the mode of taking down the depositions of the witnesses in that case, and ordering the depositions to be taken at full length as much as possible in the words of the witnesses.

Trenholme, for the plaintiff, contended that he had inscribed the case under article 234, which prescribes that when a case is not to be tried by a jury, either party may inscribe it on the roll for the adduction of evidence in the mode he had adopted, which was the only mode in which it could be inscribed upon the roll, in order that the Judge might take notes of the evidence or cause notes to be taken as prescribed by article 263.

On the 5th October last the defendant's motion was rejected with costs on the ground taken by the plaintiff's counsel.

The defendants were then notified that the plaintiff would proceed with his *enquête* on the 7th October last.

On that day plaintiff appeared at the ordinary *Enquête* sittings with his witnesses, and was about proceeding to take the evidence at length, at one of the tables in the *Enquête* room, beyond the hearing of the Judge, in the usual way in which evidence is taken at *enquête*; whereupon Mr. *Tait*, for the defendants, objected to the evidence being taken in that manner, and insisted that notes of the material parts of the evidence should be taken by the Judge or under

his immediate direction, and in his presence. That if the evidence was to be taken down by a clerk out of the hearing of the Judge the clerk was incompetent to decide what parts were material, and that the result would be that the evidence would necessarily be taken at full length precisely as under the old *enquête* system, and then the defendants would be subjected to the delay and inconvenience of an *enquête* without their consent, which he contended was not and could not be the intention of the law.

Mr. *Trenholme* declared his readiness to have the evidence taken in such manner as the Judge might determine; whereupon the Judge ordered the evidence to be taken in the *enquête* room by a clerk whom he indicated, he himself, as he stated, being present on the bench; and thereupon the parties retired to a table in the *Enquête* room, and the evidence was taken down at full length by the clerk in the manner practised for the taking of evidence under the old system of *enquête*.

On a subsequent day the clerk, who had thus been indicated by the Judge, not being present, and another Judge (*Jette, J.*) presiding, the plaintiff's counsel procured another clerk and was proceeding to have the evidence taken as under the old system of *enquête*, when Mr. *Tait*, for the defendants, made the same objection as before, contending that the defendants were being forced to an *enquête au long* without their consent, contrary to the express provisions of the Code, and contrary to the policy of the recent amendments to the law; pointing out also how the *enquête* had been continued under the former ruling of the Judge who had previously presided at *enquête* sittings.

As defendants' objection was overruled, the Judge named another clerk, and the evidence was proceeded with *au long* as before.

Trenholme & Taylor for plaintiff.

Abbott, Tait, Wotherspoon & Abbotts for defendants.

COUR DE CIRCUIT.

Devant TASCHEREAU, J.

TÉMISCOUATA, Octobre 6, 1881.

Ex parte PRUDENT BELISLE, Requérent *Certiorari*.

Certiorari—*Avis*.

Le jugement est comme suit:—"La Cour ayant entendu le Requérent, Prudent Belisle, et

l'Intimé, François Labrie, par leurs procureurs respectifs, tant sur la motion de l'Intimé, pour faire rejeter le bref de *certiorari* émis en cette cause, que sur la motion du Requérent pour faire casser le jugement rendu par le tribunal inférieur, et sur le mérite du dit bref de *certiorari*; ayant examiné la procédure, l'avis de *certiorari*, la requête du Requérent et toutes les pièces annexées au rapport fait au dit bref de *certiorari*, et sur le tout délibéré;

"Considérant que l'avis de *certiorari* en cette cause a été signifié aux nommés Léandre Gagnon et Joseph Durette, deux des Commissaires pour la décision sommaire des petites causes dans la paroisse de St. Eloi;

"Considérant que le jugement de la dite Cour des Commissaires n'avait pas été rendu par les dits Léandre Gagnon et Joseph Durette, mais bien par le dit Léandre Gagnon et par le nommé Prudent Hudon, un autre des dits Commissaires, auquel le dit avis de *certiorari*, n'a pas été signifié;

"Considérant que par la loi le dit avis de *certiorari* devait être signifié aux deux Commissaires qui avaient rendu le jugement dont se plaint le requérant, et que le défaut de signification du dit avis à l'un d'eux est fatal à la validité du dit bref de *certiorari* (*Code de Procédure*, Article 1223; *Paley on Convictions*, 3e partie chap. IV, section 3, pages 439 et 440 de l'édition de Macnamara de 1879);

"Rejette la motion du Requérent; accorde celle de l'Intimé, et en conséquence casse, annule, et met de côté le bref de *certiorari* émis en cette cause, et toutes les procédures sur icelui, avec dépens contre le Requérent, distraits à L. V. Dumais, Ecr., procureur de l'Intimé."

Dumais, procureur de l'Intimé.

Girard, procureur du Requérent.

NOTA.—Ce jugement qui est inattaquable, a cependant l'effet de faire maintenir un jugement qui est mauvais; car il a été rendu pour une dette prescrite depuis longtemps.

IMPLIED CONTRACT TO SUPPLY GOODS OF ONE'S OWN MANUFACTURE.

It is a very unusual thing to find a point of law arising in common business affairs for which there is no precedent. Such a point seems to have arisen in *Johnson v. Rayton*, 7 Q. B. Div. 438, which holds that where goods are ordered of one who is a manufacturer of them, but is not otherwise a dealer in them, there is an implied contract on his part, if he undertakes to supply

them, and there is no custom or stipulation to the contrary, that they shall be of his manufacture. There is said to be no precedent on this point in the English law. Two Scotch cases hold the contrary. Lord Justice Bramwell dissents in the principal case. The *Law Times* says of this case: "In spite of this great difference in the result, not only both courts, but also all the judges in both courts, agree up to a certain point. They agree that if a contract is made with a manufacturer of goods to whose name or skill a peculiar value attaches, to supply those goods he is bound to supply them of his own manufacture, even though there be no express agreement to that effect in the contract. For instance, if a man order a picture from the president of the Royal Academy, champagne from Moët and Chandon, or a piano from Broadwood, he is entitled to be supplied with an article of the manufacture of that man, or those firms; and that the proposition is equally true whether the article is already in existence, or has to be made. Where however the conflict of judicial opinion commences is with regard to articles to which no such peculiar value can be said to attach, articles of which one maker's is as good as another's, and which have no special repute or name, or other distinction. With regard to these the majority of the Scottish judges and Lord Justice Bramwell are of opinion that there is no agreement by the seller though a manufacturer, that the goods shall be of his own make; whereas the majority of the Court of Appeal and Lord Young (of the Scotch court) are of a contrary opinion." In a hasty search we can find nothing directly in point in the American reports. Perhaps some of our readers may be more successful. It is said, *obiter*, in *Chicago Packing and Provision Co. v. Tilton*, 87 Ill. 555, a pork case: "It is plain, however, that a party dealing with a corporation, engaged in business as a manufacturer, and in selling its manufactured goods, and whose name gives no suggestion to the contrary, has a right to assume, when it offers such goods for sale with nothing to suggest the contrary, that it proposes to sell as a manufacturer, and not as an ordinary dealer in the market, and unless the proof shows satisfactorily that plain notice of its acting in a different character was brought home to the party dealing with such corporation, it cannot insist on being treated as other than a manufacturer." This still leaves open the question how a manufacturer is presumed to sell. On principle we agree with the Court of Appeals, whose judgment is also approved of by the *Times*. The difficulty in the opposite doctrine is in drawing the line where the presumption arising from peculiar value attaches. The principal case was one of iron plates, and it may have been that the purchaser attached a peculiar value to those of the other party's own manufacture. Unless the purchaser attaches peculiar value to the manufacturer's production he usually goes to a mere dealer.—*Alb. L. J.*

The Legal News.

VOL. IV. DECEMBER 10, 1881. No. 50.

CONSOLIDATION OF THE STATUTES.

The Hon. James Cockburn, Q.C., of Ottawa, has been appointed commissioner for the preliminary revision and consolidation of the Dominion Statutory Laws, and Mr. Alex. Ferguson is to act as secretary. It is about twenty-two years since the last consolidation took place, and the advantage of the work now undertaken, if carefully executed, as we have no reason to doubt that it will be, can hardly be over-estimated.

THE GUILTEAU CASE.

Mr. George Scoville, the counsel defending Guiteau, is a lawyer of Chicago, and the *Chicago Legal News*, which is well informed, in justice to this gentleman, notices the case as follows:

"Mr. Scoville has been a member of the Chicago Bar for nearly thirty years, and although not an eloquent advocate or criminal lawyer, he has been regarded as a lawyer of marked ability, excellent judgment, sound integrity and untiring industry. The members of the Bar have always considered him an able associate and a dangerous opponent in a case. He has had a long and varied experience at our Bar. Heavy and important interests have been submitted to his care.

"Mr. Scoville has been wealthy, but, like many others in our city, became involved in real estate transactions and lost his property at the time of the panic, and but a few years ago had to pass through the bankruptcy court. He has now, outside of his practice, but very limited means. Word came to Mr. Scoville that our lamented President Garfield, without cause or provocation, had been shot down by Guiteau, the brother of his own wife. He tells a few confidential friends that from the conduct of Guiteau for years he is sure that he was insane, and that he feels it to be his duty, if no one else will undertake the task, to see that the defence of insanity is interposed, and to assist any eminent criminal lawyer that may be obtained to defend Guiteau. With this end in view he hastens

to Washington, and after repeated appeals he fails to obtain the aid of a single member of the American Bar. In a strange city, with no fortune at his command, single handed and alone, he undertakes the defence, laying aside technicalities, and placing it mainly on the ground of insanity. The members of the Bar who have watched the course of Mr. Scoville cannot but admire the ability he has displayed, in conducting the defence thus far under the most trying circumstances. He has controlled himself, avoided any exhibition of temper, or doing anything that should injure the prisoner or his cause. His candor has impressed the jury that he himself is honest in urging the plea of insanity. Whatever may be the result of this trial, the members of the Bar will commend the self sacrifice of Mr. Scoville, and his manly independence in standing up and insisting, against the united cry of an injured nation, that the slayer of its beloved President shall have a fair trial, and if found to be insane shall be treated as any other criminal under like circumstances."

QUEEN'S COUNSEL.—The following appointments have been made in the Province of New Brunswick:—Theophilus Desbrisay, Bathurst; William James Gilbert, Shediac; George G. Gilbert, St. John; R. Hutchinson, Richibucto; Benjamin R. Stevenson, St. Andrews; Daniel L. Hanington, Dorchester; Charles H. B. Fisher, Fredericton; Edward L. Wetmore, Fredericton; Pierre A. Landry, Dorchester.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, November 18, 1881.

DORION, C.J., MONK, RAMSAY, CROSS, BABY, JJ.

GRANT (plff. below), Appellant, and BEAUDRY, (deft. below), Respondent.

Public Officer—Notice of Suit under C.C. P. 22—Illegality of Orange Associations—C. S. L. C., c. 10, s. 6.

Notice of action before suit against a public officer, omitting to state where the act complained of was committed, or the residence of the plaintiff's attorneys, is insufficient.

The "Loyal Orange Institution" is an unlawful combination and confederacy, the members being bound by an oath to keep secret the proceedings of the association.

The appeal was from a judgment of the Superior Court, Montreal (Mackay, J.), Oct. 25, 1879, dismissing the action of the appellant brought against the Mayor of Montreal, claiming damages for false arrest. (See 2 Legal News, p. 354, for report of the judgment below.)

In appeal the judgment was unanimously confirmed, not only on the ground of insufficiency of the notice, but on the merits.

The following opinion was by

RAMSAY, J. This is an appeal from a judgment dismissing an action of damages brought against the respondent, Mayor of Montreal, in 1878.

The declaration sets out the existence of an Orange Association, called the Loyal Orange Institution, in Montreal; that appellant was a member of this association; that the association determined "to meet as a body on the 12th of July, 1878, at their ordinary place of meeting, in the morning, and then and there to form in procession, with marshals or officers, decorated with the insignia or distinctive marks of office, to direct the march of members so formed in procession, from the place of meeting to a church chosen for the worship of the said members, in the said city of Montreal, and there to participate in religious offices consonant with the form of worship and the object of the meeting of the said members"; that it became known to the members of this association that evil-disposed persons would meet in large number, with the avowed object of committing a breach of the peace, by assaulting, beating, and otherwise ill-treating, and perhaps murdering, the said plaintiff and his said fellow-members, with the object of preventing this procession; that the appellant and his associates applied to the authorities for protection, and specially to defendant, who was then Mayor of the city of Montreal, and a Justice of the Peace, "and that the said defendant refused to adopt any means of protection as requested to do;" but, on the contrary, that he connived at the proceedings of the persons who threatened appellant and his associates, and organized a body of men, five hundred in number, as special constables, falsely pretending that it was for the purpose of keeping the peace; that on the 12th of July the respondent assembled these special constables with the avowed object of preventing the plaintiff and his fellow-members from going in procession to church;

that the special constables so assembled on the 12th of July threatened and put in jeopardy the lives of the appellant and of his associates, and he, the said appellant, was, by command of the said respondent, arrested and prevented from going to church with his fellow-members. That the appellant, in order to justify his proceedings, obtained one Murphy to make complaint before a magistrate that the Orange Association was an unlawful society, that appellant was a member of it, and that the Association had met that day with the intention of marching through certain public streets, thereby provoking to a breach of the peace; that on this complaint a warrant was granted, and the appellant arrested, as aforesaid. The declaration then relates that to avoid further imprisonment appellant was obliged to give bail; that owing to the influence of respondent he was committed for trial, and had to renew his bail, and finally that he was indicted and tried, owing to the machinations of respondent. Finally, that he was acquitted. That by all these proceedings respondent "has maliciously caused to plaintiff considerable damages," which he estimates at \$10,000, and appellant further alleges that he has given respondent notice of this action.

It will be at once apparent that this is not an ordinary action for false imprisonment, but that the respondent is charged with acts of non-feasance, as well as with mal-feasance, in the discharge of his duties as Mayor of Montreal and as a Justice of the Peace, and that the false arrest is only an incident of this wrongdoing. He is accused of having not only improperly refused his authority to protect appellant, but having exercised it to oppress and even imprison appellant, and cause him to be unjustly indicted.

There is no doubt in my mind that such an action will lie. (See the case of *Kennett*, Lord Mayor of London in 1780, 5 C. & P. 282; and *Rez v. Pinney*, 3 B. & Ad. 953; also *Reg. v. Neale*, 9 C. & P. 43.) And I can only express astonishment that having brought such an action, and persisted in it, appellant should now maintain that respondent is not entitled to notice as a person fulfilling a public duty or function. The whole burthen of appellant's complaint is that respondent did not do his duty as Mayor, but unlawfully and maliciously, as Mayor, caused him to be prosecuted and arrested.

I would here make one other general remark on this case: that it is evidently one of those actions in which malice and want of probable cause must be combined before the defendant can be condemned. He might be acting beyond the scope of his jurisdiction, and unless he did so knowingly he must be absolved, so far as the action complains of the legal proceedings; this was decided in 1786 in the case of *Johnstone & Sutton* (1 T. R. 545.) Lords Mansfield and Loughborough distinguished cases of trespass and manifest wrong-doing from arrest on process. They then went on to say: "A man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this kind of action." (See also, in 1833, *Mitchell & Jenkins*, 5 B. & Ad. p. 588; and, in 1839, *Porter v. Weston*, 5 Bing. N. C. 715.) The law, as laid down in the case of *Reg. v. Neale*, appears to me to recognize the same principle in so far as regards that portion of the action which is based on the alleged short-comings of the Mayor.

Now, before proceeding to examine the evidence, there is one fact which strikes one forcibly on reading the declaration, and it is that, by the very acts of which appellant now complains, respondent secured him the protection that he so urgently and directly required at his hands, and preserved him from being assaulted, beaten, ill-treated, and possibly murdered. Of course, this does not completely repel the idea of the existence of malignity in Mr. Beaudry's mind. It is possible he may not have desired the immediate slaughter of Mr. Grant, but rather that he should be preserved as a subject for his malice. Such refinement will not, however, be readily presumed; and when a Court perceives that a man in the position of Mayor of a municipality so exercises his functions that a beneficial result is attained—a result specially beneficial to the complainant—it will be slow to arrive at the conclusion that malice is the main-spring of his actions. It has also been urged that the Mayor should have taken active proceedings against those who threatened the Orangemen. I fancy there never has been a doubt that those who threatened the Orangemen formed an unlawful assembly; but the reason why the Mayor did

not attempt to arrest them or disperse them by force is fully explained by the appellant's own witnesses, and particularly by Mr. Paradis, the Chief of Police, who, in answer to the question, "If twelve men are going to attack six, is it against the six or the twelve you would take precaution?" says, "If we can persuade the six not to expose themselves, we do so, but there is no comparison between an affair of five or six and an affair of thousands."

Turning to the evidence of appellant for special proof of this malice, we find it totally wanting. Nay, more, it seems to me that appellant has exercised some ingenuity in establishing that no such malice existed. It is impossible for any candid person to read the evidence without arriving at the conclusion that the Mayor was actuated by no other motive than that to which he swears when he says, p. 51, "I declare that I acted as Mayor, to the best of my abilities, in maintaining the peace, to prevent bloodshed." This is fully borne out by the evidence of Alderman Mercer, by Abraham Mackey, and, I think, by another witness, who prove the perfect fairness of the *Witness* report of what took place between the Mayor and the appellant on the 12th. By that report, it appears that after the Mayor had been most peremptorily and, I may say, almost authoritatively, assured that the Orange Association was illegal, he implored appellant to abandon the procession, and finally told him of the proceedings to which recourse would be had, namely, his arrest, if he persisted.

There is only one point on which it appears to me appellant's strictures are founded, namely as to the formation of the body of special constables. The magistrates acted very properly, under the circumstances, in refusing to swear in as a special constable any member of a secret association. To say the least, it is unfortunate that they had not exercised their discretion so as to prevent so large a number of Irish Roman Catholics from being sworn in, considering the occasion. I may also add that it is not usual to swear in a body of special constables drawn from the class to which these people seem to belong—an unknown throng in the street. Special constables are generally selected from among people whose position in society compensates, in some measure, for the lack of long training and discipline. The evil of failing to

observe this rule was apparent from the beginning, and several well-established breaches of the peace lead to the conclusion, that it is well that the safety of the town was not alone confided to this organization. It is proper, however, to observe that Mr. Beaudry did not interfere directly in the selection of the special constables. One other point deserves notice. Appellant insists in his evidence on the fact that Mr. Beaudry tried to prevent the Government sending a military force to aid in keeping the peace. But when we come to examine this it turns out that Mr. Beaudry wished the Government to send the regular troops under its command, and he disapproved of sending militia, most of whom, he feared, were Orangemen. This was not an unnatural apprehension, and some little facts to which he refers show that it was not altogether groundless. Perhaps, if Mr. Beaudry had been examined on the question, he might have told us that a mixed force would have given him still graver cause of apprehension.

There being no malice established by the witnesses, I think the cause of action fails, unless we can deduce malice as a necessary conclusion from the evident illegality of the Mayor's acts.

Now, how does this stand? The Mayor was obliged to act under the circumstances in the performance of his duty. This obligation arises from the nature of his office, and his authority to take proceedings and to swear in special constables, or to take any other necessary means to preserve the peace, is not dependent either on a vote of the City Council or on any particular statute. His obligation and his authority result from the common law. He was not only in the Commission of the Peace, but as Mayor of the city of Montreal he was a Magistrate. Preparing to perform his duty, he took counsel of no less than four advocates of the highest standing, and all through he acted with, if not *under*, the sanction of counsel. Of course bad advice does not become good because it comes from counsel, but it is to be observed that what the Mayor has to establish is not that his act was legal, but that he had probable cause for doing it. The opinion of counsel has always been of great weight in judging as to the probability of the cause.

Another presumption as to the existence of

probable cause arises from the fact that the grand jury found bills on the information. This is not conclusive, but it goes strongly against the action, unless it can be shown that the Grand Jury were improperly influenced, which is alleged, but is not proved.

Passing from this to the merits of the advice on which the Mayor acted, it is hardly possible to say that it was unsustainable. And here I must stop to allude to a reference made to my charge to the Grand Jury at the Term of the Court of Queen's Bench held in September, 1878. It will be found, on examination, that I never expressed the opinion that the Orange Order was an illegal association. Those who know its organization might draw this conclusion from my exposition of the Statute, but it was impossible for me then to state whether it was illegal or not, as I did not know the details of its organization. What I then said, to avoid misconception, I shall repeat.

"Having read to you the statute, and having explained in less technical language its general import, the Court trusts you will have little or no difficulty in discriminating whether any case presented to you, appears to fall fairly within the scope of the law or not. You will observe that it is not your duty to decide on the merits of the law, or whether it may be exceptionally or unduly severe. Neither are you to arrive at any conclusion unfavorable to the accused, or the reverse from any preconceived opinion as to the nature of an Orange Lodge, or the objects of an Orange Society. Before sending any one here for trial, it is your duty to have reasonable *prima facie* proof that an Orange Lodge is illegal under the Act, and that the accused is a member of it." (See 1 Legal News, p. 479.)

On referring to the interpretation of our act as given by me on the occasion referred to, I see nothing to alter, and if I do not repeat textually what I then said, it is because I think I can make the matter more clear if I apply that interpretation to the points raised in the discussion before this Court.

Our ordinance of the 2nd Vic. is borrowed from three Acts of the reign of George III.—37, cap. 123; 39, cap. 79; and 52, cap. 164. Though borrowed from these Statutes, there are differences, on which it is not necessary to enlarge. The words of our Statute are perfectly clear, and they extend to every society or

association whatever, "the members whereof shall, according to the rules thereof, or to any provision or any agreement for that purpose, be required to keep secret the acts or proceedings of such society or association." It is impossible to deny, and it is not denied, that these words cover every association bound to secrecy by an engagement purporting to be an oath, or otherwise. But it is sought to limit their scope in practice by invoking the preamble. But the preamble does not, as was pretended, limit the enactments following; it gives the reasons, two in number, for these enactments. It says, in effect, that there are seditious and traitorous combinations, and there are societies and associations of a new and dangerous character, "inconsistent with the public tranquillity, and with the existence of regular government," therefore all secret societies are forbidden. This is not such an unreasonable conclusion as to entitle us to say that the legislative will was other than the words of the law import. So far as cases on the English Statutes can be authority, they seem to uphold the view now taken. (See *R. v. Lovelass*, 6 C. & P. 596, and *R. v. Dixon*, 6 C. & P. 601.)

We next come to the question of whether the Orange Association comes within the terms of the law. Its members are sworn, and they are therefore under the most formal engagement to obey its rules, and one of these rules, No. 15, makes secrecy a distinctive part of the organization. It seems to me to be unnecessary to pursue the enquiry further. It is no answer for the violation of a direct prohibition of the law to say, "Our motives were good; we are really organized in support of the government."

Having arrived at this conclusion, our duty ceases. We have no special mission to point out to our fellow-subjects the expediency or inexpediency of this or that line of conduct; we have only to tell them of its legality. We have not to warn them of the absurdity of a contest, on the real merits of which both parties are thoroughly agreed. The one are Jacobites by their sympathies, the other are Orangemen; but it is more than likely both would fight to the death against a despotic form of Government. This is a truth which will be fully recognized some day or other, but in the meantime I notice it without the slightest hope of its being accepted, for we are

much more guided by our feelings than by our reason. But the feeling as to the color of a ribbon or a flower is only a prejudice, a vulgar prejudice, not really entertained by anyone of education. Some people in a higher position may affect to sympathise with such follies, but in reality they only laugh in their sleeve at such of their dupes as believe in them.

I had almost overlooked the question of notice. I think it must be clear that under the action as drawn Mr. Beaudry was entitled to notice. I also think the notice insufficient. It did not specify the grounds of the action. At most it only alluded to one, the false imprisonment, and that most imperfectly.

I would confirm the judgment of the Court below, for the reason given, and on the merits, as believing the arrest of the appellant and all the proceedings of which he had any cause to complain were carried on without malice and with sufficient cause.

The judgment of the Court is recorded as follows :—

The Court, &c....

"Considering that the first plea of respondent (defendant in the court below) is well founded, and that the plaintiff hath not proved any notice of action before suit other than that of the 19th October, 1878, which is insufficient, and not such notice as is required by law;

"Considering that the said defendant, acting in his capacity as mayor of the city of Montreal and a Justice of the Peace, in good faith and with probable cause, is not liable in damages as claimed by the action in this cause;

"Considering that the said defendant, at all the times mentioned in the declaration in this cause filed, acted in good faith and with probable cause;

"Considering further that it appears by the evidence adduced in this cause that the Loyal Orange Institution, in the said declaration mentioned, is an unlawful combination and confederacy, inasmuch as it is proved that the members of the said association, according to the rules thereof, are required to keep secret the acts or proceedings of such association, and are bound so to do by an oath or agreement not authorized or required by law;

"Considering that the said plaintiff admits that on the occasion referred to, he acted as a

member of such institution, and that he was in fact a member thereof;

"And considering that there is no error in the judgment appealed from, to wit: in the judgment rendered by the Superior Court sitting at Montreal on the 25th October, 1879, doth confirm the said judgment with costs of this appeal in favor of respondent.

"Mr. Justice Monk, being doubtful as to the illegality of the said association, concurs in the judgment of the Court on the other grounds."

Judgment confirmed.

Doutre & Joseph for appellant.

Roy, Q. C., for respondent.

Carter, Q. C., counsel for respondent.

COURT OF REVIEW.

MONTREAL, November 30, 1881.

(From S. C.; Montreal.

JOHNSON, MACKAY, RAINVILLE, J.J.

CHESTER *et al.* v. GALT *es qual.*, and CUNNINGHAM *et vir*, opposants.

Substitution—Debt of substitute.

Bank stock was left to trustees, the revenues to be paid to M. C. during her life, at her death the capital to be divided among her children. Held, that the property could not be taken in execution by judgment creditors of the children during M. C.'s life.

The plaintiffs having a judgment against the defendants, minors, have seized some shares of bank stock as their property.

Mary Cunningham opposes, and claims that the stock cannot be sold or seized, because it is substituted by the will of the late Robert Cunningham; that she has the use of it in her lifetime as *grevée de substitution*, and that the substitution is in favor of such of her children born and to be born as shall be in life at the time of her death; that it is quite uncertain now to whom the stock will have to go at that time, &c.

R. Cunningham's will is of 1864, and he died shortly afterwards. By his will he left his estate, subject to divers trusts and legacies, to two gentlemen with power to execute his will, and their office to continue till perfect execution of it, but they renounced the trust and executorship, and at that time there was not power in the Courts or Judges to name others as executors, but the execution fell to be performed by the heirs at law. The original devise to the two named executors was "desiring that they shall invest the same in

the purchase of real estate or bank or other stocks as in their judgment may be most advantageous, and pay the net annual revenue unto my sister, Mary Cunningham, during her life quarterly or half yearly, and at her death divide the capital of my estate between her children born and to be born, share and share alike, to whom I give and bequeath the same, &c." After testator's death the opposant got her husband appointed tutor to the substitution said to be contained in the will, and the bank stock seized is standing in his name. In December, 1879, plaintiffs notified the bank to transfer the shares to defendant as tutor. Later the plaintiffs seized the stock as property of the minors their debtors; hence the opposition, which has been held in the Superior Court well founded: that court has given *main levée* of the seizure, as a consequence.

The plaintiffs inscribe in review. The Judge in the Superior Court held the will of R. Cunningham to involve a substitution, and that as the first-named trustees and executors had renounced, Mary Cunningham was to be held owner of the bank stock in question, but a *charge de rendre* at her death to her children, in other words the Judge held that there was a substitution in favor of such children as would be living at Mary Cunningham's death, that the children at present had not the property, and so it had been seized improperly as theirs, &c.

MACKAY, J., dissenting. Though agreeing that the children upon whom the seizure had been practised were and are not owners nor seized at present of the bank stock in question, he held that the will did not contain a substitution; that what Mary Cunningham was to get (mere annual interest) she was not charged to *rendre*, but might waste if she pleased, that what was proposed for the children they were not appointed to get from her, but from the testator's succession represented by his heirs, upon whom all duty of executing the will has devolved, for want of other executors. He held that the will did not constitute Mary Cunningham a *légataire en usufruit*; if she had been so constituted she would have right to possession of that given to her *en usufruit* on the conditions of the old law at that time in force before our Civil Code, but the testator here meant her not to have possession, but has appointed executors to pay her out of what they have, annually, the interest. Though the

first named have disclaimed, the property is not in suspense, but it is in the heirs of the testator, and upon them is the office of executing testator's will.

JOHNSON, J. The question arising in the present case is one of unusual nicety and importance. We have had it before us for two terms, and during the present term we had the advantage of another hearing. It is impossible, as far as I am aware, for any discussion, however extensive and profound, or for any terms, however careful, to define permanently and to the exclusion of plausible criticism, what disposition of property is, or is not to be called a substitution. Every one acquainted with the subject knows this much; and every one who has written upon it shows, perhaps unconsciously, by the immense efforts at precision and finality, that such is the case.

The question arises here in the case of the will of R. Cunningham leaving to his sister Mary Cunningham (Mrs. Gilbert) the life enjoyment of his property, which is directed to be invested by his trustees and executors to pay the interest to her during her life, and after her death to divide the principal between her children. This estate, or some portion of it, being invested in bank shares, they have been seized for a debt due by the minors. Now, by whatever name we call it, this is a disposition of property which gives the usufruct to one, and the *nue propriété* subsequently to the others; but is it for all that a mere usufruct that is given? I think not. Is there not here the *charge de rendre* which is the great test of the nature of the disposition, whatever may be its name? These trustees are obliged to *rendre* to the children at Mrs. Cunningham's decease. I call that, for want of a better name, a *substitution fidei commissaire*, and that is what the learned judge below called it, I believe.

However this may be, there is one thing certain. It would be impossible to sell these shares in satisfaction of the children's debt without diminishing *pro tanto* the income and the right of the *usufruitière* or *grevée*, whichever verbal casuists may prefer to call her. This opposition then, which substantially means this and no more, ought, in my opinion, to be maintained. What the plaintiffs want is to sell these shares, which may never belong to these children. The opposition says the minors are not the sole

proprieters; the opposant has a right of property too, and so she has. It has been said that this will being made before the Code, there was no power to change the trustees. The only parties who might have an interest in raising that question are not before us. The trustees are not even parties to this case, and those who are parties do not raise the point. The judgment is against the tutor to the minors; and the shares stand in the bank in the name of the substitution. Therefore the taking in execution in itself appears irregular.

The main point, however, and that on which the case turns, is this: If you do not hold this to be a substitution, then it is impossible to find a proprietor—and the law says you *must* find a proprietor; but who are they? the children? They may never get it. The opposant? Her right is denied. It is hardly too much to say that the modern law of France—or at least the policy of that law is the very reverse of ours. There the law discourages substitutions; here our Code not only does not repress, but directly encourages an interpretation favorable to substitutions. Therefore, it is a case for the application of the article of the Code. Article 928 says even though the term *usufruit* be used (which is a much stronger case than the present one), the intention is to be considered rather than the ordinary acceptance of particular words. In one word, we must do justice and right, unless in so doing we violate not only the letter but the spirit of the law, which surely we are not doing in maintaining the rights of the opposant, under this will.

It may be observed that the idea of an opposition *afin de charge*, being the right course in the present case appears to be practically impossible, implying, as it does, an adjudication of bank shares subject to the dividends being payable to somebody else.

Judgment confirmed.

L. H. Davidson, for plaintiff.

Lacoste, Globensky & Bisailon, for opposant.

TRESPASS.

A case of trespass that will answer to accompany *De May v. Roberts*, ante, 23, is *Newell v. Whitcher*, 53 Vt. 589. The plaintiff, a blind girl, gave lessons in music, one day in each week, to the defendant's daughters, and lodged at his

house over night. A private lodging-room was assigned her by the defendant and his wife. On one occasion at midnight the defendant stealthily came into the room where the plaintiff was sleeping, sat down upon her bed, leaned over her person, and made repeated solicitations to her for sexual intimacy, which she repelled. *Held*, that the plaintiff's right to her private sleeping-room, during the night, was exclusive; and that trespass, *quare clausum*, will lie against the defendant. Sitting on her bed, leaning over her person, etc., under the circumstances, was an assault. The court said: "We think that her right to her private sleeping-room during the night, under the circumstances of this case, was as ample and exclusive against the inmates of the house as if the entry had been made into her private dwelling-house through the outer door. Her right of quiet occupancy and privacy was absolute and exclusive; and the entry by stealth in the night into such apartments without license or justifiable cause was a trespass; and, if with felonious intent, was a crime. *State v. Clark*, 42 Vt. 630. The approach to her person in the manner her testimony tends to prove—sitting on the bed and bed-clothes that covered her person, and leaning over her with the proffer of criminal sexual intercourse, so near as to excite the fear and apprehension of force in the execution of his felonious purpose—was an assault. The whole act and motive was unlawful, sinister and wicked. The act of stealing stealthily into the bed-room of a virtuous woman at midnight to seek gratification of criminal lust is sufficiently dishonorable and base in purpose and in act; but especially so when the intended victim is a poor blind girl, under the protecting care of the very man who would violate every injunction of hospitality that he might dishonor and ruin at his own hearthstone this unfortunate child who had the right to appeal to him to defend her from such an outrage. *Alexander v. Blodgett*, 44 Vt. 476." In the last case cited the court held that indecent exposure and advance in the sight of the woman constituted an assault.—*Alb. L. J.*

RECENT DECISIONS AT QUEBEC.

Payment, Indication of.—Jugé, que l'indication de paiement à quelqu'un qui n'est pas créancier du stipulant, et dans l'intérêt de ce dernier, ne l'empêche pas de retirer la somme due

et d'en donner quittance valable, quoique l'indication ait été antérieurement acceptée par un *negotiorum gestor* pour l'indiqué.—*Lajoie v. Desaulniers*, 7 Q.L.R. 272.

Affidavit — Capias ad respondendum — Saisie-arrest.—An affidavit for a *capias ad respondendum*, under C. C. P. 798, in which, as to the alleged secreting, the deponent swears: "Qu'il est informé d'une manière croyable, a toute raison de croire, et croit vraiment en sa conscience, etc.," and gives the names of his informants, held good.

Reference made to *Brooke v. Dallimore*, and *Griffith v. McGovern*, in which affidavits for *saisie-arrest* before judgment, under C. C. P. 834, in the same form as to the secreting, were held good by the Court of Appeals.—*Croteau v. Demers*, 7 Q. L. R. 277.

Practice—Writ of Execution.—Where the sale of real estate, under a writ *de terrie*, has not taken place, in consequence of the sickness, on the day of sale, of the officer charged with the execution of the writ, the plaintiff is not entitled to a *venditioni exponas*, under C. C. P. 664, so as to have the property sold after two advertisements.—*Gosselin v. Naulin*, 7 Q. L. R. 283.

GENERAL NOTES.

The Rev. Mr. Hinman, for many years a missionary among the Dakota Indians, has sued Bishop Hare for libel consisting in a pamphlet charging Mr. Hinman as being regarded in the Indian country as a man of abandoned character, and that the house-mother of one of the bishop's boarding schools reported to him that Mr. Hinman, while visiting her school, had scandalized her elder girls by beckoning to them in a suspicious way from his window in the twilight, and that he had abashed a pretty half-breed young woman, her assistant, by saying to her "—, I love you; won't you walk with me to-night; I want to talk with you." Mothers, it was charged, had refused to send their girls to the Santee boarding school, on the ground that they were tampered with by the missionary. Another lady had informed the bishop that "to her great alarm he seized her firmly around the waist, and though she struggled to get from him, kissed her several times, and refused to let her go." Probably the missionary—to adapt the expression of Rufus Choate about the amorous hay-makers—was only "seeking to mitigate the austerities" of proselytizing. On a recent motion for a commission to examine witnesses, Judge Porter said: "The plaintiff had the legal right to bring his action in this State, but his reasons for doing so are not very manifest. Whatever they may be, I am quite sure from what was disclosed upon the motion, the trial will not be likely to increase the amount of contributions to convert the Indians to Christianity, or to increase the respect of the Indians for some of its professors. Perhaps it was thought the further away from the Indians the trial should be had, the better it would be for their faith."

The Legal News.

VOL. IV. DECEMBER 17, 1881. No. 51.

THE ADMINISTRATION OF JUSTICE.

Two meetings of the Montreal bar have been held recently, at which various suggestions for the better administration of justice were discussed. The result was that the following received the unanimous assent of the members present :—

1. That there be only one division, except in cases of emergency as hereafter mentioned.

2. That the Court shall sit every juridical day except Saturday.

3. That cases be inscribed on the *role* generally, and not for any fixed day.

4. That on receipt of each inscription by the Prothonotary he shall immediately assign the nearest possible day for the hearing of the case inscribed, which shall be more than eight days after the filing of the inscription, unless both parties consent to a shorter delay, and thereupon the inscribing party shall notify the opposite party of the day so fixed for the trial of the case.

5. That the Prothonotary shall assign the days for trial of the several cases inscribed, according to the order of the receipt of each inscription, and shall put down five, and not more than five cases for each day of the sitting of the Court.

6. That each Judge shall only sit for one week at a time.

7. That the presiding Judge shall have power in his discretion to direct that a case which he may be incompetent to try, or which he may deem likely to be of a protracted character, be tried in another division, and it shall thereupon be the duty of another Judge of the Court to take the trial of such case in another separate division.

8. That the Court shall open at half-past ten in the forenoon, and shall sit till five o'clock in the afternoon, less the usual recess of one hour for lunch. And that the Court should not finally adjourn before three o'clock, unless all the parties interested in cases on the *role* for the day declare that they do not intend to proceed that day.

9. That any case which has to be continued beyond the day fixed for trial shall be put at the foot of the general *role*.

10. That in the taking of evidence stenographically, only the material parts of the evidence shall be taken down, under the direction of the judge.

11. That the rule with regard to deposit be strictly enforced.

12. That the stenographer shall read over the evidence to the witness before he leaves the box and in the presence of the Court, and shall transcribe and deposit the same, so transcribed, with the Prothonotary within three days from the examination of the witness, under pain of suspension, and that he be paid therefor at the rate of ten cents per 100 words.

The following suggestions, with regard to cases inscribed for hearing on the merits, were also approved :—

1. That the Court shall sit during the first ten juridical days of each month, over and above the Saturdays, which shall not be computed among such days.

2. That cases be inscribed on the *role* generally, and not for any fixed day.

3. That on receipt of each inscription by the Prothonotary he shall immediately assign the nearest possible day for the hearing of the case inscribed, which shall be more than one clear day, when inscribed in term, and four days when inscribed in vacation, after the fixing of the inscription, and thereupon the inscribing party shall notify the opposite party of the day so fixed for the hearing of the case.

4. That the Prothonotary shall assign the days for hearing of the several cases inscribed, according to the order of the receipt of each inscription, and shall put down six, and not more than six cases, for each day of the sitting of the Court.

5. That any case which has to be continued beyond the day fixed for hearing, shall be put at the foot of the general *role*.

6. That each judge shall only sit for one week at a time.

STENOGRAPHERS' FEES.

It is well known that a previous reduction of stenographers' fees in the Montreal Court House, from thirty to twenty cents per hundred words, had the effect of driving some of the most com-

petent stenographers away from the place altogether. They sought in other cities the remuneration which was denied to them in Montreal. The result has been more frequent complaints on the part of judges and counsel of ignorant and incompetent writers. We see that it is now proposed to reduce the rate still further to ten cents. We are at a loss to imagine what ground can be stated for this, unless it be to make the work so unsatisfactory as to compel the appointment of permanent officers of the Court for this duty, which would probably be a better system.

CARRIERS LIABILITY BEYOND TERMINUS.

In a recent case, *The St. Louis Ins. Co. v. The St. Louis, Vandalia, Terre Haute & Indianapolis R.R. Co.*, the U. S. Supreme Court has decided that, in the absence of a special contract, express or implied, for the safe transportation of goods to their known destination, a carrier is only bound to carry safely to the end of its line, and there deliver to the next carrier in the route. Where a carrier joins with other companies in establishing a through rate between points, to be divided between themselves upon the basis of distance, this fact of itself does not imply an undertaking on the part of the former to carry beyond its own line, or to become bound for any default or negligence of other carriers. Reference was made by the Court to the case of *Railroad Co. v. Manufacturing Co.*, 16 Wall. 328, a case before the same Court, in which the principle above stated had already received the sanction of the Supreme Court, and to *Railroad Co. v. Pratt*, 22 Wall. 129, as also recognizing the same rule.

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, NOV. 30, 1881.

JOHNSON, JETTÉ, MATHIEU, JJ.

[From S. C., Ottawa.

WATSON v. SMITH *et al.*

Procedure—Judgment by error—Replacing case on roll.

The Court of Review may direct a cause which has been discharged by error, to be replaced on the roll, even where the motion to restore the case is made during a subsequent term of the Court.

Semble, the proper mode of obtaining relief is by requête civile, and not by motion.

JOHNSON, J. A motion is made to restore to the roll of inscriptions in this Court a case which was discharged last term by error, during the absence of the inscribing party. I must say that I am generally for rectifying errors in all cases where it can be done without injustice. In the present case, the misapprehension is sworn to in an affidavit which is uncontradicted. There have been few cases of this kind; but there was one decided in this court in 1873, *Sheppard v. Buchanan*; and *Neil v. Champoux*, (7 Q. L. Rep. p. 210) is another case bearing on the subject. In the first case the restoration of the inscription was allowed, and I see no reason whatever alleged against it by any of the Judges, except what was expressed by Mr. Justice Mackay, to the effect that the Court was no longer seized of the case. That appears to me to be just the point that must not be taken for granted. One party says the Court has only lost its hold of the case by an error—a misunderstanding—*i. e.*, that it has not effectually been disseized of it; but only by a mistake that ought not to have the effect of an intentional act,—such a mistake as would avoid a contract—in one word that the Court is not really, and in fact, but only mistakenly and apparently disseized of the case. He says he has not lost his right any more than he could his property through error; and the existence of this error is just the fact that will determine whether the Court ought to be held to have the case still before it or not. However that may be, the decision of the Court in that case was to restore the inscription, the application being made the same term during which the mistake happened and had its effect. In the Quebec case it was a *requête civile* and not a motion that had been granted by Mr. Justice Polette, and the case was taken to review in Quebec, where his judgment was confirmed by Meredith, C. J., Stuart, J., and Caron, J. The only real difference between the two was the form, the one being a motion and the other a *requête civile*, and this, of course, is not an empty form, for under the *requête civile* you can order evidence, but not under the motion. But here there is nothing to go to evidence upon. The fact is established by affidavit, and the opposite party does not even take the trouble to contradict it; therefore it is admitted. It is not

only an allegation, which, if not denied, would be taken as admitted if it were the basis of an action; it is an allegation that is supported by an oath, and there is therefore an end of the matter as far as the fact goes. Then as to the time. The term in which this happened has elapsed; but I see difficulty in laying down any iron rule on that head. The Court is here to protect the rights of the parties, and where we see we can do so, even not during the same term, without violating any rule, or any right, we think we ought to do so. Therefore we grant the motion upon payment of costs, and order the record to be brought before us. We merely desire to add that the right course generally in all these cases is the *requête civile*, and not a motion.

M. McLeod for plaintiff.

L. N. P. Coulee for defendants.

SUPERIOR COURT.

MONTREAL, NOV. 29, 1881.

Before TORRANCE, J.

LEBEL V. PARADIS *et al.*

False arrest — Probable cause.

A larceny of bank bills of \$50 and \$20 had been committed, and persons in the dress of workmen were observed offering bills of the above denominations. Held, that there was probable cause for their arrest, and the policemen who made the arrest were freed from liability.

This was an action of damages for maliciously arresting the plaintiff, without probable cause. The plea was that the arrest was made on reasonable and probable cause. The defendants were the Chief of Police and three constables of the city of Montreal.

Early in the month of November last, a sum of \$1,200 in bills of \$20 and \$50 of the Banque Jacques-Cartier had been stolen from the office of Messrs. Lacoste & Globensky, advocates, of this city. Notice had been given to the police, and among others to the defendants, and they were on the *qui vive*. On the morning of the arrest, the plaintiff, accompanied by others in the garb of workmen, entered the Jacques Cartier Bank in the city, and presented to the clerk bills of the Bank of the denominations of \$20 and \$50, for which they asked change. Mr. Brunet, the assistant cashier, was informed, and knowing of the larceny of bills at the office of

Messrs. Lacoste & Globensky, he at once hurried off to the office of the Police, and told the police of the visit at the bank, and said that the men required to be watched. They were seen entering into a tavern near the Court House for refreshment, and on their coming out, being watched, were arrested in the vicinity of the Police office, and in the office interrogated instantly by the Chief of Police. Their explanation was that they were employees of the Quebec & Occidental Railway, and had come into town for their pay, or to have it changed, and the bills they had were received from the company. The explanation was considered satisfactory, and they were at once discharged.

PER CURIAM. The Court here sits as a jury, and it has to decide whether the plea of the defendants that there was probable cause for the arrest of the plaintiff without a warrant was made out. There is evidence that a felony had been committed, and it was the duty of the police to arrest the guilty parties, even without a warrant, and they are justified in arresting even an innocent party on probable cause. One of the leading cases in England is *Ledwith v. Catchpole*—Caldecott's cases, 291, reported at length in 1 Bennett & Heard's Leading Criminal Cases, 158, where it was held that where a felony has actually been committed, a constable, or even a private person, acting *bona fide*, and in pursuit of the offender, upon such information as amounts to a reasonable and probable ground of suspicion, may justify an arrest. Lord Mansfield said: "The first question is, whether a felony has been committed or not. And then the fundamental distinction is, that, if a felony has actually been committed, a private person may, as well as a peace officer, arrest; if not, the question always turns upon this: was the arrest *bona fide*? Was the act done fairly, and in pursuit of an offender, or by design, or malice, and ill-will? Upon a highway robbery being committed, an alarm spread and particulars circulated, and in the case of crimes still more serious, upon notice given to all the sea-ports, it would be a terrible thing, if, under probable cause, an arrest could not be made; and felons are usually taken up upon descriptions in advertisements. Many an innocent man has and may be taken up upon such suspicion; but the mischief and inconvenience to the public, in this point of view, are compara-

"tively nothing. It is of great consequence to "the police of the country." There was a verdict for the defendant. *Vide Beckwith v. Philby*, 6 B. & C. 635; *Davis v. Russell*, 5 Bingham, 359; *Rohan v. Sawin*, 5 Cushing, 281; and the foot note in *Bennett & Heard to Ledwith v. Catchpole*.

In the present case there having been a felony committed, and the prisoners, in the garb of workmen, having presented at the bank bills of \$20 and \$50, very unusual bills for persons in their station to have, the arrest appears to have been made by the police within the limits of their duty, and the plea should be maintained.

The cases of *Coyle v. Richardson*, and *Walker v. City of Montreal*, cited by plaintiff, are entirely different from the present one, and should not lead us here. As Lord Mansfield says: "An innocent man has been taken up, upon such suspicion; but the mischief and inconvenience to the public, in this point of view, is comparatively nothing. It is of great consequence to the police of the country."

Action dismissed.

Loranger & Co. for plaintiff.

Roy, Q. O., and *Ethier* for defendants.

SUPERIOR COURT.

MONTREAL, NOV. 30, 1881.

Before TORRANCE, J.

BROWN v. WATSON *et al.*

Partnership—Liability for deposit.

A sum of money was received by the financial member of a firm, who gave the receipt of the firm therefor, and credited the money to himself in trust. Held, that the firm was liable for the repayment of the amount.

The action was to recover \$2,200 and interest, alleged to have been deposited with defendants in May, 1875. The evidence of the deposit was the receipt signed by James Rose, a member of the firm, in the name of the firm.

The plea was that the defendants never received the money, and that the receipt of James Rose was a violation of the articles of the partnership.

PER CURIAM. The evidence shows that the money was received by the firm and went into their funds in the bank, and was credited to James Rose in trust in their books. James Rose was the member of the firm especially charged

with the management of the finances, and continued to have charge of the finances and books till December, 1879. He says he withdrew it in September, 1875, but replaced it subsequently. There is proof that the firm did not know the plaintiff in the transaction, and never paid her interest, but interest at 7 per cent. was credited James Rose in trust on his deposits. In December, 1879, when this trust account was closed, it was found to be deficient \$1,266.76, which was charged to James Rose individually.

The Court refers to Story on Partnership, §§ 102, 105: "If one partner should borrow money on the credit of the firm, which he should subsequently misapply to his own private purposes, without any knowledge or connivance on the part of the lender, the firm would be bound therefor." *Vide also Pollock, Digest—Partnership*, art. 18, pp. 33, 36, 39.

It is plain that the firm got the money. The borrower was the financial partner, agent for the co-partners, and they were bound by his acts. The position the court takes with respect to this matter is that the money, being received by the firm, it benefitted by it, and its agent, the financial member of the firm, James Rose, having received the money for the firm, and given the acknowledgment of the firm for it, the firm is bound thereby till repayment, and redemption of the note.

Judgment for plaintiff.

L. N. Benjamin for plaintiff.

Ritchie & Ritchie for defendants.

SUPERIOR COURT.

MONTREAL, NOV. 30, 1881.

Before JOHNSON, J.

BOILEAU v. LA CORPORATION DE LA PAROISSE DE STE. GENEVIEVE.

Corporation—Passing an offensive and injurious resolution—Damages.

The defendants, a municipal corporation, passed a resolution affecting to remit certain arrears of taxes on the ground that the plaintiff (the debtor) was about to invoke prescription. Held, that this was injurious, and that the plaintiff was entitled to have the resolution expunged from the minutes.

PER CURIAM. The plaintiff's action here is against a corporate body, alleged to have been guilty of conspiracy to injure

the plaintiff. The latter complains that on the 9th October the corporation adopted a resolution concerning him and two others, to the effect that as they owed four years of arrears of taxes, the last year should be remitted under art. 950 of the Municipal Code, inasmuch as the plaintiff and other persons named intended to invoke the prescription enacted by that article; and the resolution further directed the officer of the corporation to notify the debtors of this, and of the determination of the council to sue them if they did not pay the three years which were recoverable by law. That subsequently, on the 2nd November, there was another meeting of the council, which the plaintiff attended, and at which he informed them that their first resolution was offensive to him, and explained to them that he did not personally owe these four years' arrears, and requested the council to erase their first resolution—which request they took into consideration, and adjourned until the 10th November, when there was another regular meeting, and it was resolved not to alter or withdraw the resolution complained of, as there was nothing offensive in it. Then the declaration alleges a statement made individually by one of the individual members of this council, to the effect that it would have been humiliating to them to erase the obnoxious resolution; and subsequently it alleges that a suit was brought by the secretary treasurer in his individual capacity against the present plaintiff, and that the members are all related or connected with each other, and made common cause together to vex and insult the plaintiff; and he says he has suffered damage by all this, and concludes for a condemnation *against the corporation* for \$200, and also that they should be held to erase the resolution complained of.

This action is encountered, 1st, by a demurrer to the declaration, mainly on the ground that no action will lie against a corporation for *injure* which is alleged to result from the action of its individual members. This demurrer was dismissed; but it comes up again now on the merits; and I must dismiss it too. The ground on which it was dismissed in the practice court was that the demurrer in its terms denied the truth of the allegations as well as their sufficiency. Without questioning that, I should be disposed to go further and say, that although

the declaration does most unscientifically mix up allegations of the malice of certain individual members of this body, with other allegations of wrong committed by the body itself in its corporate capacity—and although it is clear that a corporation as such is not so liable—yet there is no partial demurrer to those allegations affecting only the individuals; and there is unquestionably in the action, an averment that not only the individuals did wrong (which is not to the purpose); but also that the corporation did wrong too. They may have no responsibility in their corporate capacity for what one or several members of the body choose to do individually; and the conspiracy alleged against these members is plainly a matter for them to answer personally. But when this corporation itself does a corporate act, such as the passing of this resolution and the entry of it in their records—and that act is injurious to another, the corporation can surely be held to repair that injury to the extent of its power. Now what is it this corporation has done which was within their authority to do, and which individuals of their own authority could not have done? They have by a majority at a regular meeting, where they were exercising their public function, placed on record what was offensive and injurious to the plaintiff. They said that although the gentlemen named in the resolution well knew they owed, yet as they wished to avail themselves of art. 950 by pleading prescription for the fourth year's arrears, they would make '*don et remise*' of the fourth year's taxes, and only ask for three years. Then they were remonstrated with by the plaintiff who seems to have behaved very temperately, and they passed another resolution that they saw no occasion to undo what they had done. I don't think it makes any difference whether they were right or wrong in their law: whether the debt they remitted or affected to remit was really due by the plaintiff or not. They probably had in view the natural obligation of a man to pay his debts—whether barred by a statute of limitations or not; and they wanted to say, and to put on record that the plaintiff had done a shabby thing, and they would make him feel it, by making him a present of the amount. This was not the exercise of a right: it was a wrong. They might have had a right to discontinue any claim they had or imagined they had: they

could have no right to do it in an offensive or insulting manner, no right to wound as they did, and plainly intended to do. Judgment for \$10 damages, and to erase within 15 days from judgment the resolution of the 9th October, 1880, and to pay the costs of this action.

J. B. Lafleur for plaintiff.

R. & L. Laflamme for defendants.

COURT OF QUEEN'S BENCH.

MONTREAL, NOV. 29, 1881.

DORION, C.J., RAMSAY, TESSIER, CROSS & BABY, JJ.
WHITMAN (plff. below), Appellant, and THE CORPORATION OF THE TOWNSHIP OF STANBRIDGE (deflt. below), Respondent.

Municipal Code—Front Road—Obligation to fence.

The fences separating a front road from adjacent lands are not part of the road, to be constructed at the cost of the municipality.

The action was brought by the appellant in the Circuit Court for the district of Bedford, alleging that the respondents had illegally opened a road across appellant's land and had neglected to fence it, whereby the appellant was injured, and put to expense in fencing his land.

The respondents pleaded that the road opened was a front road, and that they were under no obligation to make the fences.

The final judgment in the Court below was rendered by Dunkin, J., dismissing the action for the following reasons:

"Considering that it is sufficiently established in evidence that the road in the declaration mentioned, and by reason of the making of which the plaintiff was put to the expense of fences, which by this suit he seeks to recover from the municipality defendant, was duly established as a front road in respect of the lots thereby traversed, and notably of the land of the plaintiff here in question, and that at the time here in question the same was, and that it is such front road;

"And considering that the fences along such front road upon the said plaintiff's land were, and are consequently by law, a charge, not upon the municipality defendant, but altogether upon the plaintiff, and that the municipality defendant has in the premises in no wise wronged him the plaintiff."

The majority of the Court held that the judg-

ment should be affirmed. The following dissentient opinion was delivered by

RAMSAY, J. This case brings up a question which, so far as I know, is novel, and it is in contradiction to opinions generally received, which, however, seem to me to be unfounded. It will, therefore, be necessary for me to explain, with some precision, the grounds of my dissent from the judgment about to be rendered.

The appellant sued the respondent for the cost of fences which he had been obliged to put up owing to the opening of a front road across his land, and for damages arising from the failure of respondent to put up such fences. By the Municipal Code, the local municipalities (save three) in five counties support all the cost of municipal roads and bridges in the municipality. Art. 1080. "In the municipality of the town of Sherbrooke, in the local municipalities of the counties of Compton, Stanstead, Brome, Missisquoi, Huntingdon and Richmond, excluding therefrom the municipality of St. George of Windsor, and in those of the county of Shefford, excluding the municipalities of Milton and Roxton, all works on municipal roads and bridges are executed at the expense of the corporation, in the same manner as if a by-law was passed to that end under Art. 535." This is, in effect, to establish for these places a system of road-making diametrically the reverse, in every particular, of the general law on the subject. I understand that this is not denied by the majority of the Court; but that it is contended the fences are not a part of the road. And here, it seems to me, the error begins. It is perfectly true that the common law of the Custom of Paris, in rural parts, did not oblige the construction of fences, and if that law had remained unchanged I should have concurred in the judgment of the Court. But this rule has been totally changed. The change began, in the first place, by the usages of the country, owing, probably, in great measure, to the abundance of wood. The deeds of concession made the construction of fences a contractual obligation, and one so general as to be a common, if not a common law obligation. So much was this the case that the Agricultural Act treated fencing as a common law obligation, similar to boundaries. Without question or hesitation, the Civil Code adopted this, Art. 505: "Every proprietor may

oblige his neighbor to make, in equal portions or at common expense, between their respective lands, a fence or other sufficient kind of separation according to the custom, the regulations and the situation of the locality." There is no exception for the property of a municipality, whether it be a road or otherwise, and in practice no such exception is ever claimed by the municipalities. They fence their roads with their neighbors. With regard to by-roads (*routes*), to which the attention of the Legislature was specially called, there is an article applying this principle, which serves of course as an illustration of the right rule of law in all like cases not specially provided for. The Art. 775 enacts:—

"Upon any by-road which runs along the line of any land, one-half of the fence which separates such road from the land, forms part of the work to be done upon such by-road.

"But if a by-road divides a piece of land into two portions, the owner of such piece of land is not obliged to put up more fences along such by-road than he was before the establishment thereof. The remainder of the fencing forms part of the work on the by-road.

"The portions of the fences to be made on such by-roads, in default of provision therefor in any *procks-verbal* or by-law, as the case may be, are determined by the road inspector, in such a manner that the position of the neighboring proprietor be not more onerous than it was before the establishment of the road."

But, it will be said, it is provided for by a special Article, 774:—

"The fences which separate any front road from any land are at the costs and charges of the owner or occupant of such land, when the same are necessary."

But that applies to front roads generally, which are upheld by the proprietors, not to front roads which are owned and maintained by the municipalities. It is true there is no special article in so many words declaring that this does not apply to the municipalities of the five counties, but I don't think such excessive detail is required. But, at any rate, Art. 776 re-establishes the true doctrine:—

"Every fence required on any municipal road must be well made, and kept in good order, according to law."

That is to say, the necessary fences are to be maintained by those obliged for them by the law. Art. 505 of the Civil Code determines the responsibility of the municipality owner of the roads, subject to its charge.

I am therefore of opinion that the appellant should have part of his conclusions, namely, half the cost of the fencing.

Judgment affirmed.

Carter & Carter for Appellant.

O'Halloran for respondent.

RECENT ENGLISH DECISIONS.

Will—Extraneous evidence to explain ambiguity.

—A dissenting minister appointed Henry S. and William M., of C., executors of his will. There were two deacons of his chapel, Henry S. and Thomas M., and Thomas M. had a son by the name of William Abraham M. There appeared to be no other persons answering more nearly to the description in the will. Upon proof that the testator had expressed a wish that the two deacons of his chapel should be his executors, extraneous evidence was held admissible to show that Thomas M., and not William Abraham M., was the person intended to be nominated by the testator. *In the Goods of Brake*. Probate Division, 45 L. T. Rep. (N.S.) 191.

Will—Bona vacantia—Interest claimed from the Crown.—The trustees and executors of a will administered the estate; and upon its being decided, in a suit instituted for the purpose, that there was an intestacy, and no heir or next of kin being discovered, the trustees assigned the leasehold property to the solicitor for the Treasury, to be held for the benefit of the Crown. The claimants, six years afterwards, established their claim as next of kin of the testator, and the court declared them entitled. *Held*, that the Crown was not chargeable with interest on the rents and profits received from the property while in its possession.—*In re Gosman*, L. R. 17 Ch. D. 771.

RECENT U. S. DECISIONS.

Contract—Promise to marry—What constitutes refusal where no time fixed.—A contract to marry without specification of time is a contract to marry within a reasonable time. Each party has a right to a reasonable delay; but not to delay without reason, or beyond reason.

The age of the parties and the pecuniary ability of the man to support a family are proper matters to consider in the reasonableness of the delay in a particular case. In this case the woman, plaintiff below, was twenty-three years of age when the defendant below first became her suitor. He was several years older. Her pecuniary means were quite limited. She was at service as a domestic servant. He was a well-to-do farmer, worth from \$10,000 to \$12,000. The promise was made, as she testified, in October, 1877, and repeated from time to time. She testifies that he passed the evening of October 4, 1879, in her company, remaining until after twelve o'clock; that he left promising to call the next Sunday and take her to church. He came not. She had understood they were to be married the next winter. She soon heard that he was paying attention to another lady. The second Sunday passed without his coming. She then wrote him, expressing her regret at his not keeping his promise, and her grief and pain at his neglect of her, and at his attention to another girl, and asking his forgiveness for some remark she had previously made. To this letter he made no reply, and never visited her after the previous 4th of October. Sunday evening thereafter she saw him at church in company with a young lady, and both looking at her in an insulting manner, but without speaking to her. *Held*, that a jury were justified in finding a refusal to marry. Marriage is a civil contract. A refusal to fulfil it may be as unmistakably manifested by conduct as by words. The true question was whether the acts and conduct of the defendant evinced an intention to be no longer bound by the contract. This has been held a correct rule in case of an agreement of sale of personal property. *Freeth v. Burr*, L. R., 9 C. P. 208. This rule applies with greater reason to a marriage contract, which should rest on mutual affection. *Wagenseller v. Simmers*, (Supreme Court of Pennsylvania). Opinion by Mercur, J.—[Decided May 2, 1881.]

Master and Servant.—A master retaining a servant in his employ through a stipulated term of service, cannot deduct from his wages for lost time, nor compel him to make up the lost time. He may discharge him for an unauthorized absence, but by receiving him back after absence he waives the right. [The converse of this was held in the city of New York recently. A ser-

vant of the city worked ten hours a day, at an agreed price per day, and subsequently learning that eight hours constituted a legal day's work, sued the city for compensation for the extra hours. Judge Barrett held that the servant was not bound to work more than eight hours a day, but if he did he was without remedy].—*Bast v. Byrne*, 51 Wis. 531.

DISQUALIFICATION OF JURORS.—Before the examination of jurors in the Guiteau case began on the 14th ult., Mr. Justice Cox made the following address upon the subject of the qualification of jurors:

"Before you are interrogated individually, I wish to make one or two observations: Under the Constitution of the United States the prisoner is entitled to be tried by an impartial jury. But an idea prevails that any impression or opinion, however lightly formed or feebly held, disqualifies from serving in the character of an impartial juror. This is an error. As the Supreme Court say: 'In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.' If the prevalent idea I have mentioned were correct, it would follow that the most illiterate and uninformed people in the community would be the best qualified to discharge duties which require some intelligence and information. It is now generally, if not universally, agreed that such opinions or impressions as are merely gathered from newspapers or public report, and are mere hypothetical or conditional opinions, dependent upon the truth of the reports, and not so fixed as to prevent one from giving a fair and impartial hearing to the accused, and rendering a verdict according to the evidence, do not disqualify. On the other hand, fixed and decided opinions against the accused, which would have to be overcome before one could feel impartial, and which would resist the force of evidence for the accused, would be inconsistent with the impartiality that the law requires. There is a natural reluctance to serve on a case like this, and a disposition to seek to be excused on the ground of having formed an opinion, when in fact no real disqualification exists. But it is your duty as good citizens to assist the court in the administration of justice in just such cases unless you are positively disqualified, and I shall expect you on your consciences to answer fairly as to the question of impartiality, according to the explanation of it which I have given you."—*Washington Law Reporter*.

THE LAW OF BICYCLES AND TRICYCLES.—A tricycle, which was furnished with steam power upon a miniature scale, as an auxiliary force, was held to be within the Locomotives Act. Bicycle and tricycle law is thus summed up: "They are carriages, so as to have the guilt of furious driving laid at their door; they are not carriages, if asked to pay toll at a turnpike gate; but they are as much locomotives as traction engines, if they exert their powers of endurance with steam, be it ever so little, or ever so carefully stowed away."—*Law Journal*.

The Legal News.

VOL. IV. DECEMBER 24, 1881. No. 52.

THE SUGGESTED LAW REFORMS.

Since our last issue went to press we have received a copy of the "Rapport du Comité nommé pour suggérer les mesures à adopter pour rendre plus efficace l'administration de la justice dans les Cours Supérieure et de Circuit dans et pour le District de Montréal." The Committee were Messrs. S. Bethune, Q. C., R. Laflamme, Q. C., and S. Pagnuelo, Q. C. The report contains some valuable suggestions, and as it is desirable that it should be placed on record we print it below. It is to be hoped that the subject of law taxes will not be suffered to drop until some relaxation of the present heavy impositions is obtained. With regard to the Court of Appeal, the censure of the Committee seems to be somewhat premature. Sufficient time should be allowed to give the new system a fair trial before resorting to fresh measures to accelerate the progress of business. The wisdom of the suggestion with reference to the Court of Review is more than doubtful. It is proposed to add two new judges to a Bench already formidable in numbers. The expedient of taking a third judge from the rural districts is decidedly clumsy, and resembles too much the patch-work from which the bar have already suffered so grievously. Such a system would not only diminish the prestige of the tribunal but prove a serious hindrance to the continuous sittings of the Court. Then, if it be proposed to overcome this difficulty by appointing three new judges, we would have exactly the state of things so strongly condemned the other day by the first legal authorities of England. We would have three judges sitting in Review in one room, and four judges sitting in Appeal on the other side of the passage, and the latter overruling the judgments of the former. (See *ante*, p. 347.) If the political exigencies which control judicial appointments should happen to make the Review Court the stronger Court, very sad would be the state of affairs. Now, it is obvious that if three new judges were added to the Appeal Court, the Court might sit in two divisions at the same time, one at Mon-

treal and the other at Quebec, and the difficulty caused by the increase of business would be effectually overcome. We do not say that such a change is necessary at present, but it will be necessary sooner or later, and we believe it would be infinitely better than a double appeal in the Province with a further appeal to Ottawa. The disbursements of the Court of Appeal should be reduced, and the attorneys' fees regulated more in accordance with the amount involved. We append the report:—

Le comité nommé à l'assemblée du barreau de Montréal, le trois Décembre courant, pour étudier les questions concernant l'administration de la justice qui demandent une réforme immédiate, a l'honneur de faire rapport :

Qu'il a tenu trois séances où, après discussion, l'on est tombé d'accord sur les suggestions suivantes que l'on considère propres à remédier aux griefs dont on se plaint d'avantage.

Quelques-unes des réformes proposées peuvent être obtenues, comme on le verra, par l'initiative soit des juges ou du gouvernement sans l'intervention de la législature ; les autres demandent une législation nouvelle ; votre comité espère que les suggestions qu'il fait recevront, de la part de ceux qui sont le plus spécialement chargés de veiller à la bonne administration de la justice, toute l'attention et les égards que demande un sujet aussi important.

JUGES ETRANGERS.

Le barreau de Montréal et le public ont de grandes obligations à plusieurs juges qui résident en dehors de cette ville, pour l'aide qu'ils ont donné depuis plusieurs années aux juges de ce district, et nous désirons leur en exprimer publiquement notre reconnaissance.

Il serait à désirer, dans l'intérêt de l'administration de la justice, que tous les juges résidassent dans les grands centres, d'où ils iraient à tour de rôle tenir les cours dans les districts ruraux.

La nomination d'un septième juge de la Cour Supérieure à Montréal, et les changements que nous suggérons dans le but d'abréger les enquêtes et de mettre fin aux longs délibérés, rendront peu nécessaire, à l'avenir, l'aide des juges étrangers. Lorsqu'il sera nécessaire d'y avoir recours nous espérons que l'hon. juge en chef consultera les juges de Montréal et notre bâtonnier afin d'éviter de demander des juges qui n'ont pas la confiance du barreau de ce district, ceux

surtout dont la présence à Montréal a soulevé des plaintes générales. Au cas où l'on n'aurait point d'égard à cette recommandation, il sera du devoir de notre bâtonnier de convoquer sans délai une nouvelle assemblée du barreau.

Nous croyons devoir signaler au gouvernement fédéral les inconvénients de nommer à la charge de juges de la Cour Supérieure, des hommes qui n'ont point les connaissances ou l'expérience nécessaires pour assurer à leurs décisions la confiance et le respect que requiert la justice, sous le prétexte qu'on leur assigne des districts où les affaires sont presque nulles. Ils devraient être en état de siéger devant toutes les cours de la province, où leurs services sont souvent requis; de fait, ces juges siègent fréquemment dans les autres districts, obtiennent quelquefois un changement de territoire, et seront toujours un obstacle à la réunion de tous les juges dans les grands centres.

COUR DE RÉVISION.

Les frais énormes et les délais des appels à la Cour du Banc de la Reine rendent nécessaire le maintien de la Cour de Révision qui fournit d'une manière prompte et peu coûteuse, le moyen de faire réviser la décision des premiers juges. Néanmoins, pour obvier à l'objection qui est souvent faite que les juges de première instance se consultent mutuellement sur les causes qui leurs sont soumises, ainsi qu'ils l'admettent eux-mêmes très fréquemment en rendant leurs jugements, ce qui les rend incompetents à siéger en révision sur des jugements qu'ils ont plus ou moins contribué à faire prononcer, ou du moins sur lesquels ils ont déjà exprimé une opinion, nous croyons devoir suggérer que deux juges résidant, l'un à Québec, l'autre à Montréal, devraient s'occuper exclusivement des causes portées en révision et former la Cour de Révision pour la province avec un troisième juge des districts ruraux qu'ils s'adjoindraient de temps à autre. Cette cour siégerait presque en permanence à Montréal et à Québec, soit quatre jours par semaine, suivant les besoins du service et jusqu'à épuisement du rôle.

COUR D'APPEL.

Nous regrettons que la nomination d'un sixième juge à la Cour d'Appel n'ait pas eu tout l'effet qu'on en attendait; le rôle est aussi chargé à Montréal qu'auparavant, et il faut encore attendre plus d'un an pour plaider une cause après qu'elle est inscrite. La nouvelle proclamation du

Lieut. Gouverneur en Conseil qui nous accorde cinq termes au lieu de quatre est insuffisante. La Cour d'Appel devrait siéger à Montréal presque en permanence, soit quatre jours par semaine à l'exception des quatre termes ordinaires à Québec, et la Cour Criminelle ne devrait jamais être un empêchement aux séances de la Cour d'Appel. On pourrait facilement faire présider la Cour Criminelle par un juge de la Cour Supérieure, et nous suggérons qu'il en soit ainsi aussi longtemps que le rôle en appel ne sera pas épuisé. Pour parvenir à faire siéger la Cour d'appel en permanence, comme nous le demandons, nous croyons que la chose devrait être réglée par un ordre en conseil du Lieut. Gouverneur.

CODE DE PROCÉDURE.

Nous avons appris avec satisfaction que le gouvernement provincial avait mis à l'étude le code de procédure et la réorganisation des tribunaux de première instance. Mais nous croyons devoir signaler que cette œuvre difficile exige beaucoup d'étude, une grande connaissance des besoins du pays et surtout beaucoup de discussion. Ce résultat ne peut être obtenu que par la création d'une commission de quatre à cinq personnes y compris les secrétaires, qui devraient en outre soumettre son travail aux juges et aux différents barreaux de la province qui se réuniraient ensemble à cet effet à Québec et à Montréal.

FRAIS DE JUSTICE.

L'impôt sur les procédés judiciaires, plus particulièrement dans ce district, est injuste, exorbitant, et odieux, et grandement préjudiciable aux intérêts de la profession. Il est prélevé sur un nombre de personnes comparativement limité; il pèse principalement sur la classe la plus malheureuse en infligeant au débiteur incapable de satisfaire ses créanciers une dette additionnelle qu'il lui faut payer à l'Etat.

L'accès aux tribunaux doit être libre, la justice comme la liberté individuelle ne pouvant être un objet de commerce; la matière d'un contrat ne doit pas être impossible. Les tribunaux n'existent pas dans l'intérêt des plaideurs seulement, mais pour la protection de la société en général. Ceux qui ne sont pas dans la nécessité d'y recourir ne leur doivent pas moins la sécurité dont ils jouissent dans leur personne et leur propriété, et sont également tenus de contribuer à leur maintien. La préservation de

l'ordre et la répression de l'injustice dépend de l'existence et de l'efficacité des tribunaux. La règle établie dans une contestation entre deux plaideurs sur toute question de droit devient une garantie pour tous ceux qui sont dans le même cas. De toutes les charges d'une communauté civilisée, aucune n'exige une réparation plus universelle, plus équitable et plus en rapport avec les moyens des contribuables, et ce, proportionnellement à la propriété et à la richesse de chaque individu. Le système actuel met la plus forte partie de ce fardeau sur le plaideur malheureux.

Dans tous les pays où la nécessité des gouvernements commande la recherche de sources de revenus on a cru ne devoir exiger qu'une taxe légère, correspondant à peu près à celle prélevée sur les contrats généralement et comme contribution pour le salaire des officiers. Ici on en fait une taxe spéciale exorbitante, hors de toute proportion avec les impôts ordinaires.

Sous prétexte de prélever un impôt pour la construction du Palais de justice à Montréal, à une époque où le district comprenait un territoire aujourd'hui subdivisé en neuf districts indépendants, on avait d'abord imposé une taxe comparativement légère. On l'a depuis augmentée et multipliée, et notre district réduit aux présentes proportions a payé cinq fois et au delà cette construction. Après avoir fourni les frais de construction pour les cours dans les nouveaux districts, le gouvernement leur a imposé une taxe moindre que celle exigée des contribuables de Montréal, de sorte que le plaideur dans notre district contribue encore plus que celui d'aucune partie de la province après avoir payé tous les frais des constructions requises pour l'administration de la justice chez lui.

Ce système est en outre très préjudiciable aux intérêts de la profession en faisant de chaque avocat un percepteur de droits, un agent du fisc. Il ne peut suivre les intérêts de son client sans, à chaque étape de la procédure, avoir à lui signifier la nécessité de faire des avances de fonds en dehors de toute proportion avec ses honoraires tarifés. En ajoutant les frais de sténographie requis par notre système d'enquête et mérite, le seul aujourd'hui praticable et qui n'est nécessaire que pour faciliter le travail des juges qui devraient strictement prendre notes du témoignage, on peut affirmer qu'en moyenne l'avocat, pour obtenir son maigre honoraire de

\$60, dans une cause première classe contestée soit qu'il représente le demandeur ou le défendeur, doit percevoir pour le fisc une somme au moins égale et le plus souvent excédant de beaucoup ses honoraires.

En Cour de Circuit les déboursés sont de \$4 à \$12, environ, suivant la classe d'action.

En Cour Supérieure, ils sont de \$25 à \$35 en outre des frais d'enquête qui, avec le système de la sténographie tel que suivi actuellement, sont d'environ \$50 par cause, formant un total de \$75 à \$85. A cela il faut ajouter la taxe sur les dépôts 2 p.c., et les taxes sur les ventes judiciaires, 4½ p.c.

Sur la vente d'un immeuble

de \$2,000 cela forme :

Déboursés du demandeur en	
Cour Supérieure.....	\$50
Saisie, annonces et vente par	
le shérif.....	60
Taxes, 4½ p.c., sur \$2,000..	90
Déboursés sur la collocation	25

\$225

Outre environ..... 35
que le défendeur a payé au
fisc pour se défendre.....

Total \$260 ou 13 p.c.

sans parler d'honoraires d'avocats.

En Cour d'Appel, les déboursés sont d'au moins \$73 et souvent davantage ; en Cour Suprême, ils n'atteignent que \$22 à \$23.

Toute requête en Cour de Circuit, coûte 50 cents ; en Cour Supérieure, \$1 ; en Cour d'Appel, \$2 ; en Cour Suprême, dix cents.

Le système suivi en France et dans la province d'Ontario, d'accorder aux officiers de justice un traitement fixe, peu élevé, avec de légers honoraires d'office, est de beaucoup préférable à celui de faire supporter par les plaideurs tous les frais de ces officiers ; nous protestons surtout contre l'imposition de taxes sur les procédés judiciaires dans le but de payer le coût des bâties destinées aux Cours de Justice, l'indemnité des jurés, et même d'augmenter les revenus du gouvernement.

Quant aux sténographes, ils devraient être des officiers de la justice, payés par le protonotaire dont la fonction est de prendre des notes du témoignage, lorsque le juge ne le fait pas lui-même, ou par le gouvernement ; les plaideurs ne devraient payer qu'un honoraire fixe, peu élevé, pour chaque déposition quelqu'en soit la longueur.

Les notes du sténographe devraient être déposées au greffe, et transcrites seulement lorsqu'il y a révision ou appel. Le juge rendrait son jugement sur ses notes, et s'il a besoin de révéler aux notes des sténographes, il pourrait le mander et lui faire lire la partie de la déposition dont il a besoin.

Pour la transcription, lorsqu'elle a lieu, il ne devrait être exigé, dans aucun cas, plus de dix centims par cent mots.

Quelques unes des recommandations qui précèdent exigent une législation nouvelle, d'autres, l'action du gouvernement ou des juges de la Cour Supérieure. Celles qui suivent peuvent être adoptées de suite par les juges de la Cour Supérieure, si elles rencontrent leur approbation.

[The suggestions which follow the Report are those which were published in our last issue.]

TREATMENT OF PRISONERS ON TRIAL.

The trial judge in the Guiteau case has been blamed in some quarters for not resorting to sharp measures in order to restrain the torrent of vituperative eloquence flowing from the prisoner. Even if it were proper to gag a person undergoing his trial, it is clear that such a course would have been bad policy in this case, because the prisoner's sole defence has been effectually rebutted by his own showing, and the jury can have little difficulty now in estimating the plea of insanity at its proper value. But an article which we copy elsewhere, from the *Irish Law Times*, shows how irregular would be any interference with the prisoner's freedom of utterance while on trial for his life. It appears that English judges have refused to allow an unruly prisoner even to be manacled while undergoing his trial. Some of the cases referred to probably go too far. Take the case of a powerful ruffian—a bushranger—who knows that his life has been forfeited half a dozen times over, by the most brutal crimes, and who has at last been apprehended by the police after a bloody struggle. Is he to be allowed a chance to commit fresh crimes in an effort to escape prompted by the removal of all impediments? A man may be restrained from violence to others without sensibly diminishing his personal ease or interfering with his liberty of defence. See also, in connection with this subject, 2 *Legal News*, p. 337.

NEW BOOKS.

DRINKS, DRINKERS, AND DRINKING; or the Law and History of Intoxicating Liquors. By R. Vashon Rogers, Jr., of Osgoode Hall. Albany, Weed, Parsons & Co.

This book, though published in the United States, is from the pen of a Canadian barrister, Mr. Rogers, of Kingston, Ont. We have already had occasion to notice one of Mr. Rogers' works—*The Law of Hotel Life*—(2 *Legal News*, p. 353), and we then indicated that we were favorably impressed by the ability with which the author, though treating a legal topic in an unusual vein, handled his subject. This impression has been in no respect weakened, but rather confirmed by an examination of the present production. Though "Drinks, Drinkers and Drinking" may suggest broad comedy, Mr. Rogers is more serious than usual in his essay upon the law as involved with the use of intoxicating beverages. But to compensate for this, he has given us some chapters which express in the purest English the result of considerable research into a not uninteresting branch of law. The historical chapter will well reward the reader. The lawyer who needs some light reading at Christmas time cannot do better than send to Albany for a copy of this work. We could easily find some good passages for quotation, but we do not like to spoil the feast.

THE RIGHT TO MANACLE PRISONERS.

The question of the right to manacle prisoners, which arose before the commission of Oyer and Terminer on Wednesday last, is one that has not frequently been the occasion of controversy in modern times. It may, however, occur at various stages of the prisoner's custody,—at the time of his arrest, of his committal to jail, and of his appearing at the bar; and a few words upon the law applicable to each of those contingencies may here be useful.

In the first place, as regards the arrest, we consider that ordinarily, and not merely when the apprehension takes place on mere suspicion (as laid down by Mr. Levinge, Justice of the Peace), an unconvicted prisoner ought not to be manacled, unless there is reasonable ground to fear an attempt at escape or rescue; and if without reasonable grounds the prisoner is manacled, the constable would seem to be

liable to an action for assault. *Wright v. Court*, 4 B. & C. 596; *Griffin v. Coleman*, 4 H. & N. 265; *Smith v. Brears and Beach*, 1 Ir. L. T. 611; 2 Hale P.C. 219. Neither, in the dubious interval between the commitment and trial, should the prisoner be loaded with needless fetters: *Fleta*, Lib. c. 26; *Mirror*, c. 5, § 1, n. 54; 4 Bl. Com. 300; 1 Rol. 807, 1; 2 Inst. 381; 1 Hale P.C. 601; 2 Hawk. c. 22, § 32; and if the jailer shall imprison a man so straightly by putting him in stocks, or putting more irons upon him than is needful, an action will lie against the jailer: *Fitzh. Nat. Brev.* 93; *Dalton*, c. 170, § 13; 1 Ed. III., st. 1, c. 7; 14 Ed. III., st. 1, c. 10; 17 St. Fr. 453.

Lastly, as to the trial at bar, we apprehend that the prisoner ought not to be handcuffed. This question arose in 1867, when the prisoners charged with the Fenian outrage at Manchester were brought in fetters before the police court, when their counsel, Mr. Ernest Jones, having failed in his peremptory demand for the removal of the manacles, went so far as to throw up his brief (See 1 Ir. L.T. 603.) But, in our opinion, such a demand could not be insisted upon as of right. That the prisoner ought to be unshackled we doubt not; the custom is so; but it is a matter lying within the discretion of the court. In *State v. Kring*, 1 Mo. 439, affirmed 64 id. 591, indeed, where the prisoner, having on a former trial assaulted a by-stander, was brought into court the second time ironed upon his wrists, and the court refused to order the removal of the irons, *Bakewell, J.*, said: "It was no sufficient reason for compelling the prisoner to stand his trial for his life with gyves upon his wrists and his hands bound together. Officers of the court could have been placed around him if he was considered dangerous to by-standers, or he might have been placed in an enclosed space within the bar of the court, as was the English custom. Any proper precaution against escape, or to guard against danger or violence from a prisoner, may be taken during the trial. These may be such as will not deprive his counsel of free communication with him, and will not tend to inflict physical torture upon the prisoner, or to deprive him of the freest use of his limbs, and of all his faculties in that moment of extreme jeopardy. But it is certainly not permitted to fetter his hands, and if he is brought into court in irons

he is entitled to have them removed whilst actually on trial; and it is error in the court to refuse to order the prisoner to be unbound." But in a later case, *Faire v. State*, 1 Southern L.J. 348, we find it distinctly held that the right to manacle prisoners during their trial exists, and should be left to the discretion of the court. There the prisoner, who had been convicted of murder, appealed by reason of the court below having ordered his feet to be shackled at his trial. He had threatened that if he were found guilty he would never come out of the court house alive, but that he would escape, or that the officers would have to shoot him; and the sheriff, knowing his character, was persuaded that he would attempt to carry out his threat; on hearing which the judge ordered the sheriff to take any necessary precautions to prevent any attempted escape, but not to place the irons on his hands, nor to allow the jury to see what was done. His counsel asked to have the prisoner's feet unshackled. The court replied that the irons had been placed on the prisoner in consequence of representations made by the sheriff, and proposed to have him sworn as to the cause; but to this course counsel objected; and the shackles were not removed. The Supreme Court refused to reverse the conviction, holding that while it ought to require an extreme case to justify the placing of shackles or manacles upon a prisoner when undergoing trial, yet whether it is necessary or not should be left to the discretion of the trial court, and cannot be reviewed on appeal. An extreme case, certainly, was that which came before the Commission of Oyer and Terminer; yet we wholly approve of the humane determination of Baron Dowse. Peter Dillon, it will be recollected, was indicted for assaulting James Kelly. After a most violent scene, Dillon actually attempted, in the dock, to strike the governor of the jail, whereupon the learned judge ordered that handcuffs should be placed on the prisoner. This was accomplished after violent resistance, the prisoner kicking and striking about him; and then it was resolved to lash him by the hands to the bar of the dock. He then fell on the floor, and appeared as if working in a fit. "Remove him to the cells," said the learned Baron, "I will not try him in his present condition at all. Remove him; take the handcuffs off him; let

him be taken back to the prison from whence he came; and let the prison officer report to me in the morning his condition. It is impossible that he should be tried in his present violent condition. It is not a proper thing for the ends of justice to carry on the solemn form of a trial in the presence of a man in that state. That man appears to me to be out of his mind." The accused was then with difficulty removed, wrestling with the police and wardens as he disappeared, and uttering deep groans. Mr. Sheehan, Grangegorman Prison, stated that when he was stationed at Spike Island, the prisoner was a convict there, and he was very violent. He believed that the fit which the prisoner appeared to have was mere acting. "But," said Baron Dowse, "it would be indecorous in a court of justice to carry on the trial of a man in that condition. I for one will never sanction, as a judge, the trial of a prisoner at the bar of a court of justice while he is in irons—never." See 3 Inst. 34; 1 East P.C. c. 16, § 17; Leach, 36; 3 Burr. 1812; 4 St. Tr. 1303; 13 id. 221; Brit. c. 5.—*Irish Law Times*.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, November 29, 1881.

DORION, C. J., RAMSAY, TESSIER, CROSS, & BABY, JJ.
SENECAL V. LA COMPAGNIE D'IMPRIMERIE DE QUEBEC.

Declinatory exception—Amendment of declaration—Changing nature of action.

Where an action is brought in the district of Montreal for libel in another district, and the defendant excepts to the jurisdiction, the plaintiff will not be allowed to amend by alleging publication in the district of Montreal.

The plaintiff petitioned for leave to appeal from a judgment of the Superior Court, Montreal, Jetté, J., refusing him permission to amend his declaration.

The judgment of the Superior Court, which follows, will serve to explain the nature of the action, and the amendment desired:—

"Considérant que par son action en cette cause, le demandeur réclame de la défenderesse, propriétaire du journal *"Electeur"* publiée à Québec, une somme de \$100,000 de dommages qu'il allègue lui avoir été causés par la publication d'écrits injurieux à son égard;

"Considérant que la défenderesse a décliné la juridiction de ce tribunal, attendu, 1o. que ce n'est pas celui de son domicile; 2o. qu'elle n'a pas été assignée dans les limites de ce district; et 3o. que la cause d'action n'a pas et ne paraît pas avoir pris naissance dans ce dit district;

"Considérant que les parties ont ensuite inscrit leur cause pour audition sur le mérite de la dite exception déclinatoire, mais qu'au jour fixé pour telle audition le demandeur, après en avoir donné avis à la défenderesse, a demandé par motion qu'il lui soit permis d'amender sa déclaration de manière à alléguer que les écrits reprochés ont été publiés et mis en circulation dans le district de Montréal, de manière à donner par là juridiction à cette cour sur la dite demande, et que l'inscription pour audition sur l'exception déclinatoire a été ensuite rayée du rôle du consentement des parties, en sorte que la dite motion est maintenant seule soumise à l'appréciation du tribunal;

"Considérant en droit que la compétence des tribunaux est rigoureusement déterminée par la loi, et qu'aucune cour ne peut de sa propre autorité étendre sa juridiction;

"Considérant que cette règle est absolue et sans modification possible lorsque la matière même du litige échappe à l'autorité du tribunal, et que si elle peut être modifiée dans le cas où l'incompétence n'est que relative à la personne, cette modification ne peut résulter que du consentement de la partie elle-même;

"Considérant que dans l'espèce la demande telle que formulée n'indique aucunement que le tribunal ait juridiction pour en connaître;

"Considérant que bien que l'incompétence dénoncée soit ici personnelle à la partie défenderesse, cette partie, loin d'accepter la juridiction de cette cour, la décline, et par son exception demande son renvoi devant le tribunal compétent;

"Considérant qu'en l'absence d'une telle exception de juridiction par la défenderesse, la cour ne peut passer outre et s'attribuer une juridiction qui ne lui a pas été donnée;

"Considérant que la motion faite par le demandeur demandant la permission d'amender sa déclaration aurait pour effet d'attribuer à ce tribunal, malgré le refus de la défenderesse d'y consentir, la juridiction qu'elle ne possède pas maintenant;

"Considérant en outre que du moment que la juridiction est contestée, le tribunal ne peut passer outre à prendre connaissance d'aucune demande incidente ou autre, tant que la compétence n'est pas certaine ;

"Renvoie la motion du demandeur avec dépens."

RAMSAY, J. The action sets up a libel at Quebec, and now the plaintiff seeks to turn it into an action for publishing in the district of Montreal. In other words he seeks to bring a totally new action. I think the Court was right in refusing leave to amend.

Petition rejected.

Archambault & David, for plaintiff.

Mercier, Beausoleil & Martineau, for defendant.

SUPERIOR COURT.

MONTREAL, Dec. 10, 1881.

Before MACKAY, J.

ROSS *et al. es qual.* v. GUILBAULT.

Liquidators—Canada Agricultural Insurance Company 41 Vic. c. 38. (Can.)—Quality to make calls.

The liquidators to the Canada Agricultural Insurance Company are duly qualified under 41 Vic. c. 38 (Can.) to make calls.

This action was brought by the plaintiffs as assignees of the Canada Agricultural Insurance Company for \$200, being the amount of four calls of 10 per cent each upon certain shares of the company held by defendant. The first two calls were made by the directors of the company prior to its liquidation: the latter calls were made by the plaintiffs, *es qualité*, as liquidators of the company's affairs.

The defendant pleaded, principally, that the plaintiffs had no quality to make the calls, and that the special Act (41 Vic., c. 38. Can.), by which the company was placed in liquidation, only gave to the plaintiffs the powers of official or interim assignees, and that a meeting of creditors was necessary to confirm the appointment to entitle them to act as liquidators. It was further pleaded that the Acts incorporating the company as well as the Act putting it into liquidation were *ultra vires*, *quoad* the Dominion Parliament; that the company had commenced business before having the amount of stock required by its charter paid up, and that the directors of the company were guilty of extravagance and illegal acts.

PER CURIAM. By the preamble itself of the Act 41 Vic., c. 38, it appears that the plaintiffs were appointed liquidators by the creditors themselves, and that this appointment was confirmed, and a third (Geo H. Dumesnil) added by Parliament, and inasmuch as, had a meeting of creditors been called they would have had no power to replace the plaintiffs; and as by the general tenor of the Act it appears to have been the intention to give the plaintiffs full powers of liquidation, their quality is established, and the calls were legally made by them. As to the other pleas, there is nothing in them which the defendant, as shareholder of the company, could urge against the payment by him of his liability on the stock, and the judgment must go for plaintiffs for debt, interest and costs.

Church, Hall & Atwater, for plaintiffs.

T. Bertrand, for defendant.

Ritchie, Q. C., Counsel.

SUPERIOR COURT.

MONTREAL, Sept. 30, 1881.

Before PAPINEAU, J.

BINKS v. THE RECTOR AND CHURCH WARDENS OF THE PARISH OF TRINITY, and THE TRUST & LOAN CO. OF CANADA, opposants.

Immoveable by destination—Organ in Church.

An organ placed in a church used for public worship becomes an immoveable by destination under 375, 379 C.C.

The organ in Trinity Church, Montreal, having been seized, the opposants filed an opposition *à fin d'annuler*, on the ground that the organ was an immoveable by destination, and had already been seized with the Church by the opposants under a judgment obtained by them.

PAPINEAU, J., maintained the opposition.

Judah & Branchaud, for opposants.

L. H. Davidson, for plaintiff contesting.

SUPERIOR COURT.

MONTREAL, June 27, 1881.

Before MACKAY, J.

GAUVREAU v. ROY.

Resiliation of lease—Urgent and necessary repairs—Reduction of rent.

This action was for the resiliation of a lease made between plaintiff and defendant. The declaration alleged that while the plaintiff was

in possession of the premises the defendant rendered them uninhabitable by making repairs, which caused damage to plaintiff. The latter asked for the rescission of the lease and to be compensated for the damages occasioned to him.

The plea was that the repairs were urgent and necessary, that the defendant had done all that was possible to prevent loss or injury to the plaintiff, and had endeavored to finish the repairs in the shortest possible time, and he further alleged, that the plaintiff had consented to the repairs being made while he was in the house.

The Court on the authority of the following decisions dismissed the action :

Morison v. Langevin, A.D. 1870; tenant on a five years' lease quit abruptly because repairs were going on. The landlord succeeded. *Dufresne v. Hubert*, A.D. 1871; repairs not needlessly delayed, the tenant owing to less enjoyment got a reduction of rent allowed. The tenant in this case took no false position. *Langevin v. Sénécal*, A.D. 1869, and *Wiseman v. Coultry*, A.D. 1874, where diminution of rent was claimed by tenants and they succeeded.

The judgment is as follows :

"The Court, etc.

"Considering plaintiff's right to rescission not seen, no other action than for diminution of rent in any, the most favorable view for said plaintiff, doth, maintaining the *plaidoyer* first pleaded by defendant more particularly, dismiss the present action with costs."

Longpré & David for plaintiff.

Barnard, Beauchamp & Creighton for defendant.

SIR GEORGE BRAMWELL.

It is announced that Sir George Bramwell, late of the Court of Appeal, is to be raised to the Peerage. Sir George, who, in 1856, succeeded Baron Parke (Lord Wensleydale), says the *London Times*, has been upon the Bench twenty-five years, a longer period than any judge in our times except Baron Parke himself, who sat upon the Bench twenty-eight years. Sir Alexander Cockburn, the late Lord Chief Justice, was the only judge who had been raised to the Bench as long ago—he having been appointed in the same year—but he died and left Sir George still upon the Bench. The late Lord Chief Baron, Sir Fitzroy Kelly, though

many years older than Sir George (who had been in early life his pupil), was far younger as a judge, having been appointed in 1866, when Erle and Pollock retired. The natural effect of such a long tenure of judicial office as that of Sir George Bramwell is, as regards not only the Bar, but the Bench, to invest a judge with very great authority. All the other judges, the oldest of whom have only been eight or nine years on the Bench (except Lord Justice Lush, who has been thirteen or fourteen) had practised before him for years, and consequently could not help looking up to him with the deference due to known experience and the long exercise of judicial authority. The career of Sir George Bramwell was, indeed, in every way remarkable. The mere dates suffice to show that his abilities must have been great and his progress rapid; for, as he was called to the Bar in 1838, he had been only forty-three years in the profession when he retired, and of these years he had been twenty-five on the Bench. He must soon have acquired a solid reputation, for thirty years ago, when he had only been twelve years at the Bar, he was appointed on the Common Law Commission, and six years afterward he was raised to the Bench, curiously enough just ten years before his old tutor Kelly, with whom, however, he afterward sat some years on the Bench. His career, therefore, covers a considerable period in legal history and one extremely eventful and important. He was very popular with the Bar. This was probably because he was so thoroughly natural. There was nothing stiff or formal in his manner on the Bench. He was the same man on the Bench as off—shrewd, natural and good humoured. There was nothing soft or honeyed in his tone; on the contrary, his way of speaking was rather sharp, short and incisive, and his style was always terse and almost curt, but never unkind, and always fresh, racy and original and full of novel illustrations and striking analogies. An entertainment was lately given him on the occasion of his retirement from the Bench.

GENERAL NOTES.

Edgar Dewdney, Esq., Commissioner of Indian Affairs in the Northwest Territories, has been appointed Lieutenant-Governor in and over the Northwest Territories.

GENERAL INDEX TO SUBJECTS.

VOL. IV.

	PAGES
ABANDONMENT, Total loss.....	94
ABDUCTION, Proof of woman's interest in property.....	198
ABSENTEE, Wife of.....	108
ACCESSION, Cord wood.....	192
ACCOUNT, Demurrer.....	157
Vouchers.....	359
ACTION, <i>Condictio indebiti</i>	284, 340
<i>En réintégrande</i>	191
ADMINISTRATION OF JUSTICE.....	57, 401
ADVOCATE, Action for services.....	18, 34
ADVOCATE AND ASSIGNEE.....	361, 370
AFFIDAVIT FOR ATTACHMENT.....	64
AFFIDAVIT FOR CAPIAS, Sufficiency of.....	50
AGENT carrying on business in his own name, Rights of principal.....	186
Commission for procuring security for contract.....	59
Fraudulent receipt of.....	247
Liability of Commission agent on contract signed in his own name	76
ALIMENTARY ALLOWANCE.....	256
Judicial surety in gaol.....	299
ALIMENTARY DEBT, Things exempt from seizure may be sold for.....	40
ALLEYN, Mr. Justice, appointment of.....	160
ALMANACS as evidence.....	317
ALTERATION of promissory note.....	19
AMERICAN BAR ASSOCIATION.....	251
AMERICAN LAW REVIEW.....	18
AMERICAN REPORTS, Vol. 35.....	313
ANECDOTES, A scruple of conscience.....	64
An original illustration.....	32
A woman lawyer in Court.....	232
Eccentricities of Judges.....	32
Extraordinary mental anxiety.....	48
Holt, Chief Justice.....	360
Lord Ellenborough.....	360
Lord Kenyon.....	360
Lord Lyndhurst.....	360
Persistent eloquence.....	16
Plunkett.....	360

	PAGES
Sergeant Maynard.....	360
W. H. Seward's first case.....	200
APPEAL BUSINESS, 1880.....	41
APPEAL by <i>adjudicataire</i> from judgment of distribution.....	173
From interlocutory judgment...99, 100	
Interlocutory judgment.....	101
List of judgments in 1880.....	66
To Circuit Court, from decision of Municipal Council.....	299
To Privy Council.....	99
To Supreme Court, amount asked by declaration to be looked at.....	91
Where case turns upon evidence which is contradictory.....	281
ARREST without warrant, after an interval of time following the offence.....	216
ASSAULT.....	399
Consent.....	111, 128
Defence, mutiny.....	110
Of husband upon wife.....	160
Upon a child, Consent.....	64
ASSESSMENT, Mode of attacking.....	156
ASSESSMENT ROLL.....	230
ASSIGNEE, Commission on sales.....	107
Official assignee acting under appointment of creditors, Default of	78
Remedy against.....	84
ASYLUM, The right of.....	235
ATTACHMENT, Secretion.....	141
ATTORNEY AND CLIENT.....	48
Agreements between.....	368
ATTORNEY, Costs.....	105, 110
<i>Désaveu</i>	384
Liability for bailiff's fees.....	375
ATTORNEY GENERAL, Direction of, to lay indictment before Grand Jury...41, 90	
AVEC, Division of.....	146
AYANT CAUSE.....	239
BABY, Hon. Mr. Justice, Appointment of..	138
BAIL, Liability of sureties.....	187

- BAILIFF, Action against bailiff who has become surety..... 164
 At sea..... 360
 Contempt of Court..... 173
- BALL DRESS, As necessary wearing apparel..... 79, 185
- BANK, Cancellation of shares..... 314
- BANKRUPTCY LEGISLATION, Lord Sherbrooke on..... 289
- BAR EXAMINATIONS..... 18, 225
 In England..... 193
- BAR (The), New by-laws..... 377
- BEACONSFIELD, Lord..... 192, 252
- BEES..... 344
- BENCH AND BAR IN NEWFOUNDLAND..... 234
- BENEDIKT'S ANATOMICAL STUDIES..... 202
- BICYCLES AND TRICYCLES..... 408
- BIGAMY..... 320
- BILLS AND NOTES, Undisclosed principal... 344
- BISHOP, Power to bind his successors in office..... 338
- BLAKE, Vice Chancellor, Resignation of... 170
- BOSSE, The late Mr. Justice..... 314
- BOUTHILLIER (T.), The late..... 80
- BRAMWELL, Lord Justice..... 348, 416
- BREACH OF PROMISE OF MARRIAGE... 80, 266, 274
- BRIEFS, Sale of..... 49
- BROKER, Margins on stock..... 208
 Real estate, Right to commission.. 208
- BUCHANAN, Mr. Justice, Appointment of... 103
- BUILDING AND INVESTMENT ASSOCIATION, Legality of Incorporation..... 374
- BUILDING SOCIETY, By-law irregularly enacted..... 133
 Loan on security of promissory note 269
 Purchase of real estate..... 363
- BURGLARY..... 313
 Intent of entry..... 103
 Proof of intent..... 200
 Verdict, receiving stolen goods on indictment for burglary..... 100
- BURIAL GROUND complained of as a nuisance..... 175
- CAMPBELL (Lord) learning dancing..... 82
- CANADA AGRICULTURAL INSURANCE COMPANY, Powers of liquidators..... 415
- CANADIAN BARONY..... 144
- CANADA LAW JOURNAL..... 19
- CANADIAN LAW TIMES..... 18
- CAPIAS, Affidavit..... 282, 400
- After judgment..... 342
- Bail..... 111
- Damages for issue of..... 89
- Defendant who has given bail under C.C.P. 825, bound to file statement 324
- Departure with intent to defraud... 324
- Existence of debt at time of alleged secretion..... 50
- Form of affidavit..... 47
- Fraudulent preference a "secreting" 321
- Petition to quash..... 221
- Special bail..... 263
- CAPITAL PUNISHMENT in foreign countries.. 209
 In Russia..... 224
- CARRIER..... 313
 Liability beyond terminus..... 402
 Liability of..... 191
 Negligence..... 246
 Rights of express companies on railroads..... 16
- CERTIORARI, Notice..... 391
- CHARTER-PARTY, Involuntary bailee..... 343
 Larceny by bailee..... 375
- CHEQUE, Overdraft..... 302
 Unaccepted, Rights of Holder..... 16
- CHIEF JUSTICES OF ENGLAND..... 192, 208
- CHIEF JUSTICESHIP, S. C..... 145
- CIRCUMSTANTIAL EVIDENCE..... 256
- CIVIL PROCEDURE IN QUEBEC..... 361
- COLLAR, The S. S..... 80
- CLERICAL INFLUENCE IN ELECTIONS..... 3, 9, 10
- CLIFFORD, Mr. Justice..... 344
- CLUB, Rules governing interference of court with action of Club..... 287
- CODE (Civil), Interpretation of Art. 2613.. 70
- COLLISION..... 111
 At sea..... 120
 Between vessels of different nationalities..... 319
 Compulsory pilotage..... 304
- COLVILLE, Sir James W..... 1
- COMMERCIAL TRAVELLERS, License tax, St. John, N. B..... 93
- COMMISSION. See Agent.
- COMMISSION AGENTS, Liability on contract signed in their own name..... 76
- COMMISSIONERS' COURTS, Procedure..... 298
- COMMISSIONERS OF COMMISSIONERS' COURTS, Recusation of..... 305
- COMMUNITY, Adultery of wife..... 352
- COMPANY, Action against shareholder for unpaid calls..... 78

Defects in organization pleaded in answer to action for calls.....	331, 334	Obstruction on sidewalk.....	300
Sale of all the assets.....	162	(of Montreal), damages caused by alteration of street level.....	25
COMPENSATION, Plea of, to action for freight.....	61	Punishment for contempt.....	376
Plea of, to action for malicious seizure.....	61	Purchase of immoveables.....	184
COMPOSITION, Proof of execution of deed of.....	50	COSTS.....	82, 191, 373
Secret payment of amount in excess of.....	20	Action by wife for separation from bed and board.....	323
CONFESSION procured by inducements.....	328	Action en bornage.....	352
CONFESSIONS TO PRIESTS.....	257	Case settled without payment of costs to plaintiff's attorney...105, 110	
CONGÉ DÉFAUT.....	157, 375	Demurrer maintained as to part of demand.....	306
CONTEMPT OF COURT by bailiff.....	173	Discretion as to.....	77
By solicitor.....	200	On dilatory exception.....	170
Service of rule for.....	102	Of contestation, where plea admits indebtedness.....	132
CONTRACT.....	314	Under Judicature Act.....	128
Acceptance of offer.....	375	COUNSEL, Addresses of.....	232
Breach of.....	226	COUNSEL FEES.....	18, 34
Engineer's certificate.....	248	CRIM. CON., Mitigation of damages.....	16
Illegal.....	337	CRIME IN EUROPE.....	104
(Implied) to supply goods of one's own manufacture.....	392	CRIME, New phases of.....	297
Interpretation.....	227, 374	CRIMINAL LAW MAGAZINE.....	18
Made by partner for benefit of firm.....	182	CRIMINAL PROSECUTION, Compromise of... 302	
Made while ship is in peril.....	203	CROWN, Assessment for Municipal taxes... 240	
Misrepresentation.....	210	CUMULATIVE SENTENCE.....	103
Obligation of corporation to pay for services of which it has availed itself.....	42	CURATOR to vacant estate.....	280
Partnership interest.....	15	CUSHING, The late Mr. Lemuel.....	75
Promise to marry.....	407		
Real estate broker.....	208	DAMAGES against City Corporation, caused by obstruction on sidewalk.....	300
Repudiation by purchaser.....	208	Against doctor bringing unprofessional person with him to a case of confinement.....	231
Restraint of trade.....	112	Alteration of street level by city corporation.....	25
Sale of machine for particular purpose.....	175	Awarded by court of first instance.. 91	
To compromise criminal prosecution.....	376	Caused by object thrown from upper window.....	46
CONTRAINTÉ PAR CORPS against judicial sureties.....	299	Caused by horse kicking.....	343
CONVICTION, Punishment not sanctioned by law.....	132	Caused by obstruction in street... 243	
COPYRIGHT.....	265	Depriving municipal elector of his vote.....	191
COPYRIGHT CONVENTION, Anglo-American... 98		Dogs killed while trespassing.....	79
COPYRIGHT IN ENGRAVING.....	8	For criminal conversation.....	16
COPYRIGHT, NEWSPAPER.....	376	For malicious issue of capias.....	89
CORD of firewood, Standard foot.....	356	For mental suffering.....	273
CORPORATION, Acting as a.....	108, 373	Illegal arrest by City Corporation.. 215	
Illegal arrest.....	215	Lessee's action against lessor for damages caused by another lessee.....	326
Injurious resolution.....	404		
(Municipal) Liability of, for injury from defective sewer.....	260		
Liability for services of which it avails itself.....	42		

Negligence.....	118, 367	Division of answer.....	146
Negligence in crossing railway track	212	Examination of assignee in action	
Obstruction on street.....	216	instituted by him in his quality of	
Roofers allowing pieces of metal to		assignee.....	170
fall from roof.....	2	Examination of minor.....	85
Surface water.....	376	Of partnership.....	341
DARTMOUTH COLLEGE.....	80	On appeal to Circuit Court from de-	
DEATHS during the Long Vacation.....	384	cision of Municipal Council....	299
DE BELLEFRUILLE'S Municipal Code.....	385	On prosecution for rape.....	344
DECLINATORY EXCEPTION. See Service.		Parol evidence of promise.....	55
DEED, Ancient.....	201	Proof of acceptance.....	218
Cancelled by the parties not revived		Proof of notarial instruments in cri-	
by registration.....	34	minal cases.....	347
DÉLAISSEMENT.....	191	Proof of paternity.....	352
DELEGATION, Acceptance.....	38	Refusal of witness to answer.....	114
DÉLIBÉRÉS, Protracted.....	114	Tutor bringing action for minor....	192
DEMURRER.....	314	Withdrawal of objectionable evi-	
Allegation of time and place.....	54	dence from jury.....	92
Curé sued personally for refusing as		Writing <i>sous seing privé</i>	110
chairman to receive vote.....	355	EXCEPTION TO THE FORM, Costs.....	324
DEWDNEY, Lieutenant Governor.....	416	EXECUTION.....	134
DIRECTORS, Profit by, at expense of corpora-		Exemptions from seizure.....	185
tion.....	376	Immoveable.....	158
DISCONTINUANCE, <i>Congé d'fault</i>	375	Postponement of sale.....	400
DISRAELI as a lawyer.....	192	Publishing sale of moveables.....	168
DOCTORS, The perils of.....	231	Second seizure of lands.....	96
DUNKIN, The late Mr. Justice.....	10	Seizure of immoveable of succession	131
DUVAL, The late Chief Justice....	158, 161, 165	Seizure of railway.....	333
		Usufruct of moveables.....	120
		EXECUTIONS ON FRIDAY.....	296
EJECTMENT, Procedure in action of.....	35	EXECUTOR, Grounds of removal.....	126
ELECTION ACT, Acts of sub-agent.....	94	Imprudent investment.....	61
Colorable employment.....	94	Liability of.....	268
ELECTION, Clergyman refusing sacraments		Powers of.....	86
to a voter.....	3, 9, 10	Right to interest on monies advanced	268
ELECTION EXPENSES, Personal expenses of		Solidarity.....	248
candidate to be included.....	95	EXHIBITS.....	240
EMPLOYER AND EMPLOYEE.....	233, 239	EXPERTS AT FAULT.....	128
ENDORSEER of composition notes, how affected		EXPERT, Evidence of.....	48
by secret payment in excess of		EXPERTS IN HANDWRITING.....	121
composition rate.....	20	EXPRESS COMPANIES, Rights of, on railroads.	16
Rights of, where note shows a mani-		EXPROPRIATION, Alteration of street level..	25
fest alteration.....	19	EXTRADITION.....	63
ENGRAVING, Copyright in.....	8		
ENQUÊTE.....	390	FAITS ET ARTICLES, Service.....	108
ERROR (Clerical) in Judgment, Correction		FALSE PRETENCE, What necessary to con-	
of.....	77	stitute.....	280
ESCAPE pending appeal.....	168	FALSE PRETENCES, Obtaining money by sell-	
ESCHEAT.....	369	ing worthless railway tickets as	
EVIDENCE.....	314	valid.....	41
Certificate of Prothonotary.....	50	FINDER OF LOST MONEY OR GOODS, Rights of...33, 113	
Confession procured by inducements	328		

FOLLE ENCHÈRE	101	IMMOVEABLE by destination	365, 415
Pending appeal by <i>adjudicataire</i> , from the judgment of distribution....	173	Seizure of, under writ of <i>saisie-arrest</i> ..	60
FOREIGN ENLISTMENT ACT	169	IMPERIAL DISTINCTIONS	169
FOREIGN SOVEREIGN, Jurisdiction over	192	INCIDENTAL DEMAND, Action in ejectment... 35	
FORGERY	103, 240	Service of.....	183
In Austria	2 1	INCUMBRANCE on property sold with clause of "franc et quitte".....	67
Inchoate instrument.....	304	INDICATION OF PAYMENT.....	38
FORMA PAUPERIS, Proceedings in	192	INDICTMENT, Burglary and larceny.....	64
FRAGMENTS OF LEGAL LITERATURE, The value of	82	Direction of Attorney General to lay indictment before Grand Jury.41, 90	
FRAUD	343	Several counts in.....	43
Principal and Agent.....	48	INJUNCTION, Interim order.....	293
FRAUDS, The Statute of	88	Procedure.....	282
FRAUDULENT CONVEYANCE.....	314	Violation by Corporation.....	376
FRAUDULENT PREFERENCE.....	321	INSAISSABILITÉ of thing does not prevent its seizure for alimentary debt....	40
FREIGHT, Action for.....	61	INSANE HOMICIDES, Punishment of.....	330
		INSANITY as a defence.....	136, 329, 353
GAMBLING CONTRACTS.....	337	INSOLVENCY	227
GARNISHEE, Contestation of declaration of 44, 86		INSOLVENT ACT (of 1875) Sect. 68, Action by creditor	116
GENERAL COUNCIL of the bar.....	192	(of 1875) Action to recover goods..	118
GIBBS, Angill.....	1	Assignee's commission on sale of real estate.....	107
GOODWILL, Sale of.....	222	Costs of previous contestation.....	299
GRAND JURY, Disclosure of proceedings be- fore.....	225	(of 1875) Creditor holding security	48
GUARANTEE by trustee of church.....	301	(of 1875) Debt represented by note of which holder is unknown.....	154
GUIVEAU CASE.....	393	Default of official assignee.....	78
		Evidence of assignee.....	170
HABEAS CORPUS to test jurisdiction of Judge of Sessions.....	99	(of 1875) Notice required to termi- nate lease to insolvent.....	138
HARBOR COMMISSIONERS OF MONTREAL, Right to remove obstructions on wharf.....	2, 126	(of 1875) Recovery of debts under Sect. 68.....	134
HATHERLEY, The late Lord.....	225	Remedy against assignee.....	84
HEARD'S Oddities of the Law.....	354	(of 1875) Resiliation of deed.....	352
HOMICIDE	241	(of 1875) Sale in contemplation of insolvency.....	130
Attempt.....	103	Security for costs on contestation of petition for discharge.....	298
Identity.....	103	INSOLVENT SURETY on bond in appeal.....	244
Singular case of.....	256	INSOLVENT, Costs in action against	373
HUSBAND AND WIFE, Agreement to dissolve marriage contract.....	344	Landlord's claim for unexpired lease	51
Attachment of moveable effects of husband by wife <i>commune en biens</i>	85	Refusal of discharge after year— where deficiency of assets was not explained.....	333
HYPOTHECARY CREDITOR, Claim to rent of property hypothecated.....	276	INSOLVENT BANK, Set off by stockholder....	283
HYPOTHEC, Insolvency.....	213	INSOLVENT ESTATE, Claim of third party against insolvent estate.....	317
On lands of unknown owner, Dili- gence.....	386	INSURANCE (ACCIDENT), Death from volun- tary exposure.....	80

INSURANCE (GUARANTEE), Deficiency in accounts of employee.....	147	In Pennsylvania.....	288
Privilege.....	229	In the United States.....	177
INSURANCE (FIRE), Change of Ownership without consent.....	205	Ontario.....	97, 104
Claim not made within delay stipulated by the policy.....	77	JUDICIAL SURETIES, Contrainte par corps...	299
Loss occasioned by the felonious act of the wife of insured.....	288	JUDICIAL SYSTEM, Change of.....	113
Misrepresentation and concealment	79	JURISDICTION, Appeal to Supreme Court....	91
Notice of loss.....	280	Right of action.....	120
Powers of agent.....	194	JURORS, Disqualification of.....	408
Promissory representation.....	254	JUROR, without religious belief.....	320
Total destruction.....	314	JURY, Discharge of, on trial for felony....	17
Vendor and purchaser.....	241	JURY TRIAL, Misdirection.....	92
Waiver.....	254	Motion for judgment <i>non obstante veredicto</i>	140
INSURANCE (LIFE), Pernicious habit.....	314	Motion in arrest of judgment.....	115
Wager policy.....	230	JUSTICES OF THE PEACE, Jurisdiction.....	280
INSURANCE (MARINE), Total loss.....	94	Removed for corrupt practices.....	320
INSURANCE LEGISLATION.....	385	KEELER, M. P., The late Mr.....	40
INSURANCE, Mutual Insurance Company....	295	LARCENY, Idem sonans.....	102
Parol contracts of.....	330	LAW COSTS in England.....	129
INTEREST on purchase money.....	45	LAW REFORMS, Suggested.....	409
INTERLOCUTORY JUDGMENT, Appeal.....	100, 101	LAW, The Practice of.....	232
INTERNATIONAL LAW, Jurisdiction over foreign sovereign.....	192	LAW SOCIETY.....	89, 112
INTERROGATORIES UPON ARTICULATED FACTS, Answers to.....	95	LAWYERS at College.....	143
INTERVENTION.....	263	LAWYER, The oldest practising.....	1
INVENTION, Novelty.....	181	LAWYERS' FEES.....	296
INVENTORY.....	352	LEASE, Capacity of lunatic to make.....	8
IRISH LAND BILL.....	241	Causes of resiliation.....	111
JAMES, Lord Justice.....	192	Claim of lessor for unexpired lease where lessee becomes insolvent..	51
JAMES, The late Lord Justice.....	232	Conditional Sale.....	237
JUDGES AND THEIR RELATIONS.....	208, 224	of butcher's stall, Lessor's right of re-entry.....	382
JUDGES, Banquets to.....	177	Resiliation of.....	415
Increase of.....	289	LEGACY, Revocation of.....	280
Of English County Courts.....	200	LEGAL CURIOSITY, A.....	201
In England, Changes on the Bench.	305	LEGAL HUMBUGS.....	319
Presents to.....	33	LEGAL PROCEDURE in England.....	345
Resuming practice.....	193	LEGAL PROFESSION, The function of.....	313
JUDGMENT, Correction of clerical error in..	77	LEGAL STUDY.....	145
JUDGMENTS, Notice of.....	185	LEGAL VACATION, The.....	281
JUDICATURE ACT, Ontario.....	1	LEGISLATION AT QUEBEC, Bills introduced..	153
JUDICIAL APPOINTMENTS in England.....	185	LEGISLATION respecting telegraph poles...	328
Quebec.....	129	LEISURE HOURS.....	251
JUDICIAL LABOR, N. Y. Court of Appeals....	1	LENGTH WITHOUT LUCIDITY.....	256
JUDICIAL PENSIONS.....	49	LESSEE, Rights of, when property is sold by Sheriff.....	39, 41, 45
JUDICIAL REMUNERATION.....	161, 193	where repairs are made to leased premises.....	415
JUDICIAL SALARIES, N. Y.....	240		

LESSOR AND LESSEE, Damage to lessee by another lessee.....	326	MONTREAL BAR SECRETARYSHIP, 129, 152, 168, 175	
LIBEL by a bishop.....	400	MONK, The late Mr. John.....	369
Defence to action of.....	136	MONTREAL JUDICIARY.....	103
In a newspaper article.....	359	MOSS, The late Chief Justice.....	9
In way of profession.....	51	MOVEABLES becoming immoveable by destination.....	365
Mr. Irvine's Bill.....	207	MUNICIPAL CODE, Front road.....	406
The law of.....	145, 185	MUNICIPAL CORPORATION, Liability for personal injury in city building let for profit.....	360
LICENSE ACT, Discretion of municipal council to refuse certificate.....	255	Prescription of action against.....	335
Information.....	384	Purchase on credit.....	370
(Quebec), Amendment of 1879 applicable to restaurants.....	146	Writ of prohibition to.....	230
LICENSE TAX imposed on commercial travellers.....	93	MUNICIPAL FRONT ROAD.....	334
LITIGIOUS DEBT.....	280	MUNICIPAL TAXES.....	240
LOAN, Admission of liability.....	316	MUNICIPAL VOTER.....	191
LOCAL LEGISLATURE, Authority to legislate for regulation of public houses.....	158	MUNICIPALITY, Division of.....	240
Powers of.....	125, 258, 278	Repairs to bridge.....	358
LONGEVITY, Remarkable.....	1	MURDER OF FOREIGN POTENTATES, Encouraging.....	305, 306
LOST MONEY, Rights of finder.....	33	MURDER OF PRESIDENT GARFIELD.....	217
LOVELL'S GAZETTEER OF B.N.A.....	226	MUTINY.....	110
LOWELL, J. R.....	88	MUTUAL INSURANCE COMPANY, Consent to other insurance.....	295
LUNATIC, Capacity to make a lease.....	8		
		NEGLECTANCE, Collision.....	111
MCDONALD, Chief Justice.....	170	Contributory.....	175, 385, 387
McGLOIN'S Reports.....	226	(Contributory) in malpractice.....	380
MALICIOUS ARREST.....	403	(Contributory) Horse injured while being shod.....	387
MALICIOUS PROSECUTION.....	224, 227	Crossing railway track.....	211
Compensation of damages.....	244	Evidence of.....	128
MALINS, Vice-Chancellor.....	144	Excavation in street.....	134
MANDAMUS, Where result fruitless....	220, 224	Injury to person stopping upon street.....	216
MANSLAUGHTER.....	64, 314	Measure of prudence.....	256
MARRIAGE, Condition of will in restraint of.	56	Obstruction in street.....	243
With deceased wife's sister.....	18	Of carrier.....	246
Evidence of.....	240	Of municipal corporation.....	260
When one party intoxicated.....	208	Shutter falling from house.....	357
MARRIED WOMAN sued as widow.....	120	Throwing object from window.....	46
MASTER AND SERVANT.....	49, 111, 157, 408	Workman allowing metal to fall from roof.....	2
Assault.....	128	NEWSPAPER.....	193
MATHIEU, (Mr. Justice), Appointment of...	330	NEWSPAPER ARTICLE encouraging murder of foreign potentates.....	307
MAYOR OF LOCAL COUNCIL, Vote of.....	158	NEW TRIAL, To obtain evidence of experts.	48
MAZARINE BIBLE.....	144	NEW YORK COURT OF APPEALS, A year's work of.....	1
MENTAL SUFFERING as an element of damages	273	NOTARIAL ACTS in criminal cases, Proof of	347
MINOR, Action by father of, for wages due minor.....	63	NOTARY, The oldest.....	80
Examination of minor as witness in action brought by tutor.....	85		
MITOYEN WALL, Loss suffered by rebuilding of.....	351		

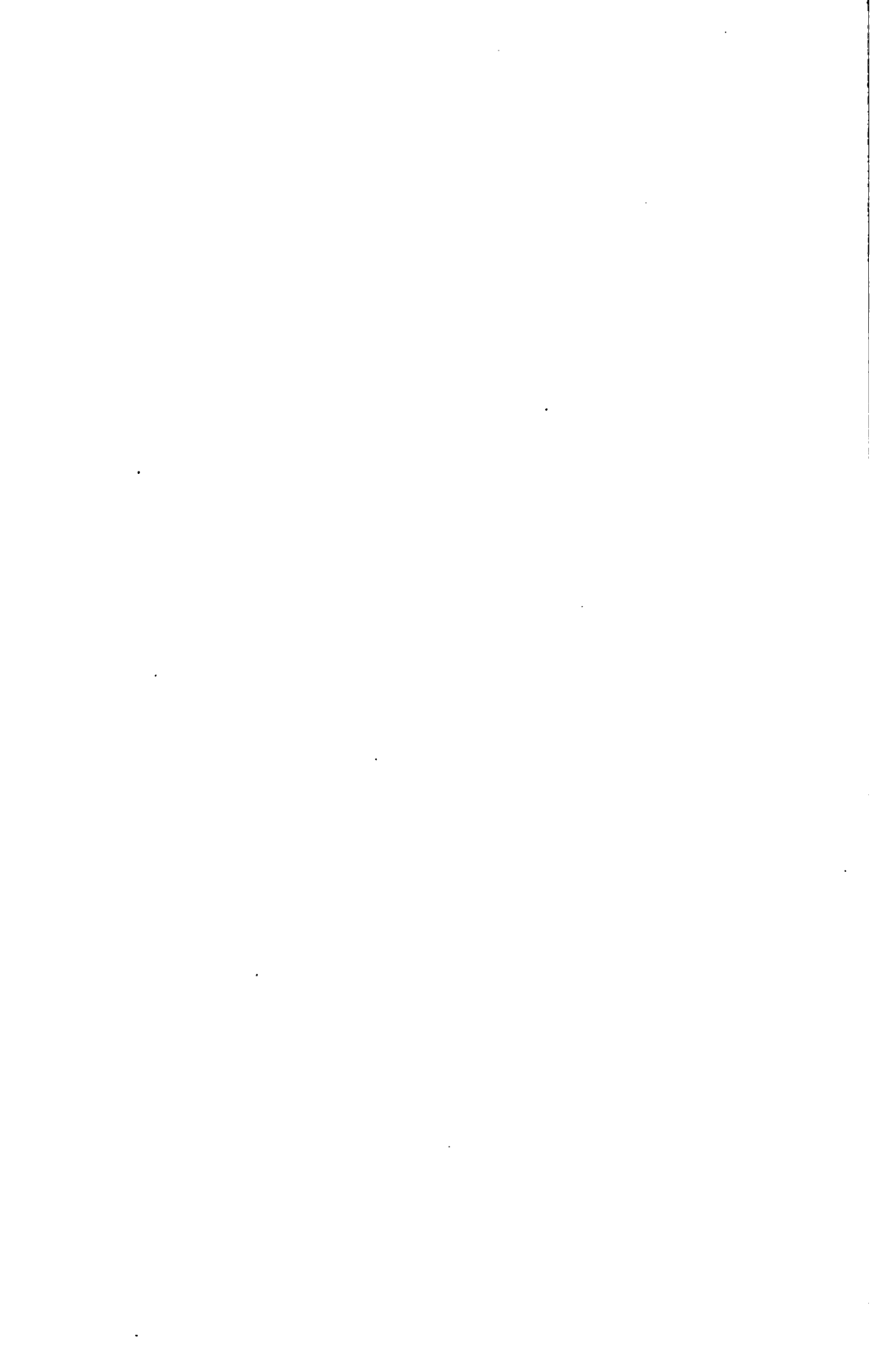
NOTICE, CONSTRUCTIVE.....	286	Demurrer to action for malicious seizure.....	61
NUISANCE, Burial ground.....	175	Inconsistent allegations.....	53
From noises.....	136	Petitory action.....	352
Telegraph poles.....	328	Plea of compensation by damages to action for freight.....	61
OATHS AND GLOVES.....	56	Rejection of plea on motion.....	381
OATH of party improperly ordered.....	82	to action of <i>séparation de corps</i>	298
OFFICERS of Courts of Justice.....	280	POLICE inciting to crime.....	265
OLIVIER, The late Mr. Justice.....	314	POLICE TRAPS.....	104
ONTARIO JUDGES, Supplementary aid to....	33	PRESBYTERIAN CHURCH IN CANADA, Temporalities Fund.....	258
ONTARIO JUDICATURE ACT.....	1	PREScription.....	64
OPPOSITION, for purpose of obstruction....	101	C. C. 2261..	292
(Tierce).....	247	Conventional, of claim under Policy	77
(Tierce) by person whose interests are affected by a judgment.....	326	Municipal Code, Art. 1045.....	335
ORANGE INSTITUTION, Illegality of.....	393	PRESENTS to JUDGES.....	33
ORGAN in church, an immoveable.....	416	PRIESTS, Confessions to.....	257
OVERWORK.....	81	Influence in elections.....	3, 9, 10
PARNELL, The arrest of.....	348	PRINCIPAL AND AGENT.....	48, 186, 344
PARTNERSHIP, breach of agreement to share profits of contract.....	15	PRISONERS ON TRIAL, Treatment of.....	412
Contract made by partner for benefit of firm.....	182	PRIVATE RE-HEARINGS.....	104
Joint and several liability.....	133	PRIVILEGED COMMUNICATION.....	93
Liability for deposit.....	404	PRIVILEGE, Furnisher of coal for household consumption.....	140
Proof of.....	341	PROBABLE CAUSE.....	227, 403
PATENT, Infringement of.....	319	for issue of <i>capias</i>	89
Novelty of principle.....	181	PROCEDURE, Amendment of declaration.....	414
Provisional order to restrain use....	183	Amendment of writ of summons....	306
PAYMENT, Indication of.....	400	Answers to interrogatories.....	95
Under compulsion.....	284	British Columbia.....	80
PAWNBROKER, What constitutes a.....	134	Capias issued after judgment.....	342
PENALTY, Two defendants sued jointly and severally for one penalty.....	53, 385	Closing enquête.....	349
PENSIONS to retired Judges.....	49	Commissioner's Court.....	298
PAREMPTION, Error in prothonotary's certificate.....	101	Contestation of declaration of garnishee.....	44
PERRY (Henry), The sentence of.....	81	Death of defendant after inscription in Review.....	350
PERSONAL INJURIES caused by object thrown from window.....	46	Delay for filing preliminary pleas..	384
R. V. Rogers on.....	177, 187	<i>Désaveu</i>	350
See Negligence.		Execution.....	134
PHARMACY ACT, Quebec.....	125	Exhibits.....	240
PLEADING, Admission of indebtedness by plea without deposit.....	132	Faits et articles.....	108
Demurrer.....	54, 355	Folle enchère.....	101
Demurrer should precede plea of general issue.....	324	Injunction not under 41 Vic. c. 14.	282
		Inscription for <i>enquête</i>	390
		Intervention.....	263
		Motion in arrest of judgment.....	115
		Registrar's certificate.....	64
		Replacing case on roll after judgment	402
		Revision of rulings.....	221
		Service of incidental demand.....	183

Writ of prohibition.....	100	RESTRICTIVE COVENANTS, Constructive notice	286
PROHIBITION, Inscription.....	100	RETROACTIVITY, Vested right.....	70
(Writ of) to Municipal Corporation.	230	REVIEW, DEPOSIT.....	102, 351
PROMISE OF MARRIAGE.....	314	REVIEW, Inscription by witness (a bailiff)	
PROMISE TO MARRY, What constitutes refusal	407	who has been suspended.....	354
PROMISSORY NOTE, Death of endorser.....	194	Interlocutory judgment.....	277
Defence of forgery.....	48	RIGHT OF ACTION.....	120, 220
Demand of payment.....	110	RIVER, Dam.....	384
Made by society.....	373	ROGERS' Drinks, Drinkers, and Drinking..	412
Manifest alteration.....	19	RULES OF PROFESSIONAL CONDUCT.....	361
Non cancellation of stamps.....	48		
Payable in foreign country, Protest			
of.....	154	SABBATH OBSERVANCE.....	313
Payment to endorser.....	133	SAISIE-ARRET avant jugement, affidavit....	375
Stamps.....	340	Before judgment, Seizure of immove-	
PROTHONOTARY, Certificate of.....	50	ables.....	60, 277
PUBLICATION of obscene advertisement....	176	Jurisdiction.....	280
Trade mark in name of.....	291	SAISIE GAGERIE.....	158
PUBLIC CONTRACT, Rescission of.....	343	SALARY OF PUBLIC OFFICER.....	120
PUBLIC HOUSES, Regulation of.....	153, 158	of Tutor (précepteur) not exempt	
PUBLIC LIBRARIANS.....	89	from seizure.....	54
PUBLIC OFFICER, Attachment of salary.....	120	SALE.....	352
Notice of action.....	191, 393	Action to rescind.....	138
PUNISHMENT for reputation.....	272	Circumstances amounting to fraud	171
		Clause of "franc et quitte".....	67
		Commencement of proof of.....	111
		Credit.....	219
		Conditional.....	237, 288
		Defendant exposed to trouble entitled	
		to security.....	55
		Deficiency in quantity.....	221
		Fraud.....	130
		Goods to be delivered "shortly"....	139
		How may be attacked as fraudulent	
		by creditor not party to the deed.	164
		Liability of purchaser to pay interest	
		on purchase money when the pro-	
		perty is mortgaged for a larger sum	
		than the price due.....	45
		Of good will.....	222
		Of horse, Plea of <i>quanto minoris</i> for	
		redhibitory vices.....	373
		Of machine for particular purpose..	175
		Progeny.....	114
		Resiliation.....	245
		SALVAGE.....	203
		Of specie.....	142
		SCHOOL COMMISSIONERS.....	157
		SCHOOL TAXES.....	157
		SCHOOL TEACHER, A travelling tutor is not a	
		school teacher (<i>instituteur</i>).....	54
		Engagement of.....	375
QUEBEC ELECTION ACT, Voters' list.....	131		
QUEBEC TURNPIKE BONDS.....	92		
QUEEN'S BENCH, Business in appeal 1880...	41		
List of judgments in appeal 1880...	66		
Quorum to hear cases in appeal.	2		
QUEEN'S COUNSEL, Appointments.....	274, 393		
RAILWAY, Seizure of.....	333		
RAMSAY, (Mr Justice) Inaugural address of	65		
RAPÉ, Evidence.....	344		
RECORD, Alteration of.....	373		
RECUSATION of Commissioners.....	305		
REGISTRAR'S CERTIFICATE, Contestation of..	64		
REGISTRATION.....	247, 336		
Property under seizure.....	280		
Will not revive a resiliated deed....	34		
RELIGIOUS AND EDUCATIONAL INSTITUTIONS,			
Exemption from taxation.....	115		
RÉNÉRIÉ, Right of, Failure to exercise with-			
in time stipulated.....	206		
REQUÊTE CIVILE, Cases giving rise to.....	352		
Grounds for.....	325		
RESERVED CASE, When Judge of Sessions			
cannot reserve.....	372		
RESTRAINT OF TRADE.....	121		

SECRETARY-TREASURER, Liability of.....	233, 239	SUBSTITUTION	336, 389
SECRETION	141	SUCCESSION, Ascendant	283
SECURITY FOR COSTS	110	SUCCESSION, C. C., 2613	70
Contestation of insolvent's petition		Seizure of immoveable of succession	
for discharge	298	as the property of one of the heirs	131
Costs on dilatory exception	170	SUICIDAL IMPULSE, The	321
Foreign company with place of busi-		SUMMARY CONVICTION, Sentence	253, 303
ness in the Province	351	SUMMONS, Writ of, Amendment	306
SEDUCTION, Damages	375	SUPERINTENDENT of Public Instruction, Au-	
SENTENCE	253, 297, 303	thority of	119
Confinement of prisoner after expira-		SUPREME COURT ACT, Sect. 4	95
tion of	289	Business	89
Cumulative	231	Decisions	137
Style of passing sentence	81	Of Canada	65, 73, 97
SÉPARATION DE CORPS, Pleading	298	Bills concerning	59
Costs of action	323	Decisions of	121
SÉPARATION DE CORPS ET DE BIENS, Action for	85	Decisions in Quebec cases	106
Adultery of wife	352	General rule	105
SERMENT SUPPLEMENTAIRE	82	SURETIES under C.O. P. 828	187
SERVANT, Action against master for persuad-		SURETY	247, 376
ing her to illicit intercourse	344	SYSTEMS of Legal Procedure	74
SERVICE of Rule for contempt	102		
Personal action	60	TARIFF OF FEES, Tax on filing pleas	119
Return of	53	TAXATION, Exemptions	115
SHARES, Cancellation of	314	Ship agent not liable for tax on brok-	
SHAREHOLDER, Action against, for calls	78	ers	327
SHERIFF'S SALE, Rights of lessee of property		TAXES, Demand of payment	134
sold	39, 41, 45	TELEGRAMS, Production of	170
SHIP AGENT not subject to tax on brokers		TELEGRAPH COMPANY, Cutting down orna-	
and commission merchants	327	mental trees	91
SHIP, Collision	120	TELEGRAPH POLES, Legislation respecting	
Contract made while vessel is in		erection of	328
peril	203	TELEPHONES, The law of	63
Deviation	248	TEMPERANCE ACT, Canada	125
Drawn by tug, Collision	264	TENDER, With condition annexed	77
SLANDER, Privilege	192	THESIGER, The late Lord Justice	103
Privileged Communication	93	TIERE SAISI, Contestation of declaration ..	86
Words not actionable <i>per se</i>	75	TIFFANY'S LAW OF REGISTRATION	202
Words not slanderous in primary		TITLE, Possession as caretaker	95
sense	56	TOLL BRIDGE	277
SOUTHERN LAW REVIEW	18	TORRANCE, Mr. Justice, on the administra-	
SPAULDING'S PRACTICE in Civil Actions	354	tion of justice	57
SPECIAL REPLICATION	352	TRADE, Agreement not to carry on business	384
SPECULATIVE SUITS	249, 252	TRADE MARK, Adulteration of goods	237
SPITTING, as an American custom	296	In the name of publication	291
STAMP ACT, Double stamping of note	48	Similarity sufficient to deceive	37
STATUTES, Consolidation of	393	TRESPASS	248, 399
STENOGRAPHERS' FEES	401	Right of Company to cut ornamental	
STEPHENS' JOINT STOCK COMPANIES	162	trees	91
STOCKHOLDER in insolvent Bank	283	TRIAL BY JURY	338
STRONG, The late Mr. Justice	16	Discharge of jury on trial for felony	17
SUBROGATION	195, 247		

TROLLOPE (Anthony) on Cicero	233	WAREHOUSEMAN	199
TROUBLE, Defendant entitled to security	55	WEARING APPAREL	79, 185
Liability of purchaser to pay interest		WIFE, Attachment by, of moveable effects	
on purchase money when the pro-		of community.....	85
perty is mortgaged for a larger		Liability for goods bought for her	
sum than the price due.....	45	business by her husband as her	
TROVER	92	attorney.....	172
TRUSTEE of church, Personal liability	301	Of absentee, Petition to be author-	
TRUSTEES, Right of survivor	151	ized to do business.....	108
TUTOR	192	Payment of husband's debt	228
		Pledging credit of husband	8
		Purchase of necessities	264
		Will, Annuities	124
UNDERHILL'S LAW OF TORTS	203	A short.....	320
UNDUE INFLUENCE	3, 9, 10	<i>Bona vacantia</i>	407
UNIVERSITY COLLEGE, Toronto	272	Condition in restraint of marriage ..	56
UNPAID VENDOR	118	Custody of	112
UNPROFESSIONAL CONDUCT	281, 370	Construction of	194
USEFRUCT, Moveables	120	Eccentric bequests	344
		Error in name of legatee	386
		Extraneous evidence to explain am-	
VENDOR AND PURCHASER	67, 92	biguity.....	407
As regards fire insurance.....	241	Interpretation of	86
Interest on purchase money.	8	Of eminent lawyers	175
VERDICT, Indictment for burglary	100	Presumption of revocation	288
		Substitution	336, 389
		WITNESS. See evidence	
		Testimony of minor.....	85
WAGES, Action for wages due minor	63	WOMEN IN OFFICE	369
Claim for services rendered to rela-		WORDS, "Necessary" and "Advisable" ...	156
tive without agreement as to re-		WRIT OF ERROR, Presence of prisoner at ar-	
muneration	55	gument on.....	239
WAIT, William, The late	16	WRITTEN OPINIONS	128





Stanford Law Library



3 6105 062 740 712



